

108425

# TRANSCRIPT OF RECORD.

---

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

**No. 187**

---

NORFOLK & WESTERN RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

---

ON ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF  
WEST VIRGINIA

---

FILED JANUARY 4, 1923

**(29,329)**

(29,329)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 187

NORFOLK & WESTERN RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF  
WEST VIRGINIA

INDEX

	Original	Print
Caption in supreme court of appeals.....	a	1
Petition of Norfolk & Western Ry. Co.....	1	1
Assignments of error.....	7	5
Proceedings before Public Service Commission.....	9	5
Petition of John Followay.....	9	5
Order directing railway to answer.....	15	8
Answer of Norfolk & Western Ry. Co.....	18	9
Testimony of H. T. Hicks.....	23	12
Exhibit to Testimony of Hicks—Blue-print map show- ing location of proposed grade crossing.....	59A	30
Testimony of John Followay.....	60	30
J. E. Dotson.....	95	47
F. A. Lindsey.....	107	54
W. O. Franklin.....	114	57
Exhibit 1 to Franklin's Testimony—Blue-print map showing road crossing wanted by John Followay....	148A	73
Exhibits Nos. 2, 3, and 4 to Franklin's Testimony— Photographs showing east, west, and south views of track .....	148B	73

	Original.	Print.
Testimony of John Followay.....	149	73
Testimony of W. O. Franklin.....	155	77
Reporter's certificate.....	163	79
Findings of facts and order of Public Service Commission.	165	80
Secretary's certificate.....	169	82
Argument and submission.....	171	82
Decree .....	171	83
Opinion, Miller, J.....	173	84
Order staying mandate.....	182	91
Order overruling petition for rehearing.....	183	91
Petition for rehearing.....	184	92
Petition for writ of error.....	195	96
Assignment of errors.....	197	97
Bond on writ of error.....	199	98
Writ of error.....	202	98
Citation and service.....	204	99
Clerk's certificate.....	206	100

[fol. a]

## CAPTION

PLEAS BEFORE THE

**SUPREME COURT OF APPEALS OF THE STATE OF  
WEST VIRGINIA**

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 10th day of April, 1922, the following order was made and entered, to-wit:

4618

NORFOLK &amp; WESTERN RAILWAY COMPANY, Petitioner,

vs.

PUBLIC SERVICE COMMISSION et al., Respondents.

This day came the Norfolk & Western Railway Company, by Holt, Duncan & Holt, Theo. W. Reath and Lucian H. Cocke, its attorneys, and presented to the Court a petition praying for the suspension of an order entered by the Public Service Commission of West Virginia on the 11th day of March, 1922, in a proceeding before it wherein John Followay was complainant and this petitioner was defendant, which petition is now ordered filed; upon consideration whereof, the Court doth take for consideration as to the date of hearing of a motion for temporary suspension of the said order, pending the final hearing upon said petition, and doth order that a copy of this order be forthwith delivered to the Secretary of the Public Service Commission.

The petition aforesaid and the papers, documents, evidence and records, or certified copies thereof, as certified to this office, pursuant to the notice given by a copy of the foregoing order, by the Secretary of the Public Service Commission, are in the words and figures following:

[fol. 1] IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NORFOLK AND WESTERN RAILWAY COMPANY, Appellant,

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, Appellee.

Appeal from Order of the Public Service Commission of the State of  
West Virginia

PETITION—Filed Apr. 10, 1922

The Norfolk and Western Railway Company respectfully represents that it is aggrieved by an order entered on the 11th day of



March, 1922, by the Public Service Commission of West Virginia in the case of John Followay against the Norfolk and Western Railway Company, which case is carried upon the docket of said Commission as No. 1309, and files herewith the record and evidence upon which said order was based, and tenders this its prayer and petition that said order may be reversed and annulled.

### The Facts

There was a considerable amount of testimony taken in this case, but for practical purposes there is no conflict in the testimony in regard to the substantial facts which must govern the conclusions of law concerning this controversy.

[fol. 2] McCarr is the name of a siding of the Railway Company, located on its main line, about ten miles east of Williamsen. It was originally established owing to the fact that the traffic of the Allburn Coal Company is served at this point. The mines of this company are located on the Kentucky side of Tug River, and the Coal Company has constructed and owns a bridge over which its coal is transferred in tram cars to tipples adjacent to the tracks of the Railway Company on the West Virginia side, and from such tipples the coal is loaded into railway cars for transportation.

This siding was established some ten or twelve years ago, soon after the Coal Company had begun its operations, and the Railway Company has been receiving prepay shipments for this point and such consignments are unloaded, placed at a convenient point on the right of way and left there at the risk of the consignee. No station or shed room of any kind is located at McCarr. There is no public road or public access to the right of way of the Railway Company at this point. The bridge of the Coal Company is a private thoroughfare, but through the courtesy of the Coal Company it is used to a considerable extent by persons in order to cross the river.

Some ten years ago Mr. Followay built a store on the north side and adjacent to the right of way of the Railway Company, and has been receiving goods at this siding. Most of his goods come from the West and are unloaded on the south side of the railroad tracks, and he has transported the same across the tracks a distance of some three or four hundred feet to his storehouse, moving them by hand and sometimes using a wagon.

Sometime before these proceedings were instituted, the Railway Company was engaged in the readjustment of its tracks at this point, [fol. 3] which involved the elevation of one of its tracks to a considerable extent. This work was done in the usual course of business and with no purpose of making any obstruction to the crossing whatsoever, but the result of this track elevation was to make the crossing practically impossible; yet, in spite of the existence of almost impossible conditions, Mr. Followay continued to use the crossing, resulting in additional danger to the trains of the Railway Company, as well as to his employees who were moving wagons over the elevated track.

Under these circumstances, and realizing the dangerous nature

of this crossing, as well as the additional dangers which had come to it as the result of the elevation of one of its tracks, the Railway Company put posts along its right of way so that it was impossible for wagons to use this point as a crossing. This action of the Railway Company is the subject of Mr. Followay's complaint, and his allegation in respect to the crossing is as follows:

"(d) That no regular grade or other crossing has been made at this point to permit the complainant, and others in like situation, to convey their goods received at this station by freight across the tracks of the defendant, but until very recently the road bed and right of way and tracks of the defendant have been in such condition as to permit your complainant and others to convey goods from the South side of the tracks to the North side thereof, by wagon and other vehicle, thus rendering it possible to convey freight from one side of the tracks to the other, but that within the past few days the Railway Company, through its employees, has removed ballast, gravel and other matter from the road bed, and in addition thereto [fol. 4] has caused to be set in the ground of the road bed heavy timbers or posts, apparently for the express purpose of making it impossible for persons to cross the tracks with a vehicle at this point; that this work, and particularly the setting in the ground of these timbers, has rendered it impossible for your complainant to move his freight in any practical way from the place the same is unloaded by the defendant to his place of business \* \* \*."

His prayer for relief is as follows:

"\* \* \* that after due investigation and hearing, an order may be made commanding said defendant to cease and desist from the violation of the laws referred to above, and be required to construct and keep open a suitable and proper crossing for the use of the shippers and public utility at this location, and be required to erect and construct here a suitable structure in which can be housed against weather such freight as is destined for this point, and unloaded here, with suitable and convenient access to such station from either side of the tracks by proper grade crossing from the one side to the other of the said tracks; \* \* \*."

For practical purposes, there are only two shippers that have any substantial interest in freight deliveries at McCarr; i. e., the Allburn Coal Company and Mr. Followay. There are, however, other occasional sporadic shipments concerning which there is no special complaint or representation. Most of the shipments of both Mr. Followay and the Coal Company come from the West and are de-[fol. 5] livered on the south side of the track, yet shipments for both come from the East and are placed on the north side of the track. Under these circumstances, the Coal Company would not be interested, as far as the crossing is concerned, for its shipments which come from the West, as they are removed without crossing the tracks at all, but it has the same condition to meet in respect to crossing with its shipments from the East as is complained of by Mr. Followay.

way on his shipments from the West. The Coal Company, however, makes no request that this passage be kept open.

On behalf of the Railway Company, it was shown that the crossing is located upon a curve, that the road is double tracked, and that adjacent to the tracks are high bluffs, that the trains move at the rate of forty miles per hour, and that engineers on trains coming from either direction could not see a wagon on the crossing for a distance as much as three hundred feet, and that in the event an engineer should see a vehicle or person on the crossing within this distance of visibility it would be impossible to stop the train and avoid a collision if the train was moving at the ordinary speed at which trains are accustomed to move at this point on the road.

It was also shown that the station of Matewan is located one mile east of the point in question, and that a good county road to Matewan passes within a short distance of Mr. Followay's store.

It also appeared by uncontradicted testimony that the crossing in question was exceedingly dangerous and that a collision with a wagon team would produce most disastrous results—for instance, the wrecking and derailing of a passenger train.

[fol. 6] Another element of especial danger is the fact that the coal screen of the Allburn Coal Company is located adjacent to the crossing in question and that when this is in operation the noise resulting therefrom drowns the noise of an approaching train, or any signal, bell or whistle, that may be given by the engineer of an approaching train.

The Commission thereupon entered the following order:

"It is, therefore, ordered that the defendant, Norfolk & Western Railway Company, do, within thirty days from the date hereof, construct, and thereafter maintain, a reasonably safe and suitable roadway across its tracks at or near the point where said crossing was formerly used by the complainant, as aforesaid; to be not less than eight feet in width, and to be so constructed and maintained as to render the same reasonably safe for the use of vehicles crossing said tracks; subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) The entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) While said crossing is being used by the complainant, as aforesaid, [fol. 7] for the transportation of goods across said tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing for the purposes aforesaid."

# ASSIGNMENTS OF ERROR—Filed Apr. 10, 1922

Your Petitioner assigns as error in the foregoing order of the Commission the following:

First. That the Commissioner is without jurisdiction to enter the order complained of;

Second. That the order is null and void in that it violates the property rights of the Railway Company, preserved to it by the Constitution of the State of West Virginia, under Sections 9 and 10 of Article III;

Third. That the order is null and void because it violates the property rights of the Railway Company, guaranteed under the Fifth Amendment, as well as the Fourteenth Amendment, of the Constitution of the United States;

Fourth. That the order is unconstitutional because of its unreasonableness in forcing a dangerous grade crossing upon the Railway Company.

Your Petitioner further says that it has delivered a copy of this Petition to the Secretary of the Public Service Commission before [fol. 8] sending same to this Court, and respectfully prays that the order aforesaid of the Commission may be suspended and a time fixed in accordance with Section 16, of Chapter 15-*o* of the Code of West Virginia, for the hearing of this application, and that appeal from said order of the Commission be allowed and that the said order be reversed and annulled; and your Petitioner will ever pray, etc.

Norfolk & Western Railway Company, By Holt, Duncan & Holt, Theo. W. Reath, Lucian H. Cocke, Its Attorneys.  
April 6th, 1922.

[fol. 9] STATE OF WEST VIRGINIA:

PUBLIC SERVICE COMMISSION

Case No. 1309

JOHN FOLLOWAY, Complainant,  
against

THE NORFOLK & WESTERN RAILWAY COMPANY, a Corporation, Defendant.

PETITION OF JOHN FOLLOWAY

The petition of the above named John Followay, complainant, respectfully shows:

## I

That the complainant is a merchant engaged in selling, at retail, groceries and merchandise generally, at McCarr Station, in Mingo

County, West Virginia; and that this complaint is made for himself and others in like situation as himself in relation to the matters and things herein set out.

## II

That the above named Norfolk & Western Railway Company, defendant, is a public service utility, engaged in the operation of a railroad, and as such is a common carrier at and through Mingo County, in the State of West Virginia, and as such is subject to the provisions of Chapter 15-O of the Code of West Virginia, 1918, and the provisions thereof applicable to this class of public service utilities.

[fol. 10]

## III

That the said defendant company has violated the laws of the State of West Virginia, governing its business in the following particulars, to-wit:

(a) That McCarr Station, in Mingo County, West Virginia, is situate approximately one mile, by rail, and one and one-half miles by county road East of the town of Matewan, West Virginia; that the station is, and for many years has been, a regular stop for local freights and passenger trains; that two or more coal companies, to-wit, the Allburn Coal Company and the Winifrede Thacker Coal Company, operating on the Kentucky side of the River at this point, reach the main line of the Norfolk & Western Railway and ship the coal produced by them from this point; that passengers are received at McCarr Station and the trains stopped to permit passengers to debark there; that freight consigned to McCarr Station is unloaded at this point, both in local shipments and in car lots; that freight is received at this place and dispatched from here; that this practice and custom have continued for ten years or more.

(b) That no station, or station facilities, of any character, has ever been constructed or used by the Railway Company, nor such station made available for those who ship and receive freight at this point; but, on the contrary, such freight as is received at this place when in less than car lots is unloaded from the trains carrying the same and placed on the ground near the tracks, there exposed to the weather and to the danger of theft, there being no station agent or other person employed by the railroad to care for or look after such freight.

(c) That the complainant, for ten years, or more, has conducted at this point a retail store, which is located on the North side, and near to the tracks of the defendant; that the goods which complainant receives for his store are consigned to him at McCarr Siding and unloaded at this place and placed on the ground, as above set out, without any provision against theft or protection from the weather. That most of the goods received by freight by the complainant are shipped to him from West of McCarr Siding, and therefore are brought to this point by the defendant in East-bound trains

and unloaded on the South side of its tracks, next to the river; that in order that the goods so unloaded here can be taken to the store of the complainant they must be conveyed across four tracks of the defendant, to-wit, the regular East-bound and West-bound main line of the Railway Company and two sidings or passing tracks which are located here.

(d) That no regular grade or other crossing has been made at this point to permit the complainant, and others in like situation, to convey their goods received at this station by freight across the tracks of the defendant, but until very recently the roadbed and right of way and tracks of the defendant have been in such condition as to permit your complainant and others to convey goods from the South side of the tracks to the North side thereof, by wagon and other vehicle, thus rendering it possible to convey freight from one side of the tracks to the other, but that within the past few days the Railway Company, through its employees, has removed ballast, gravel and other matter from the road-bed, and in addition thereto has caused to be set in the ground of the road-bed heavy timbers or posts, apparently for the express purpose of making it impossible for persons to cross the tracks with a vehicle at this point; that this work, and particularly the setting in the ground of these timbers, have rendered it impossible for your complainant to move his freight in any practical way from the place the same is unloaded by the defendant to his place of business. Complainant frequently obtains freight in car load quantities, and almost daily receives freight by local shipments, all of which freight is on the South side of the tracks of the defendant company or is unloaded on the ground South [fol. 12] of the tracks of the defendant company, and must, by some means, be conveyed across these tracks to the place of business of the complainant. This action of the defendant is intentionally done to render it impossible for this complainant to convey these goods and this freight across the tracks by any practicable method. Much of the freight is in heavy containers or parcels, such as barrels of flour and heavy boxes, and is, therefore, almost, if not quite, impossible to convey the same a distance of two or three hundred feet or more from the place where it is unloaded to the place of business of complainant unless the same can be hauled or moved by wagon or some vehicle; nor is there any other crossing over the tracks of the defendant near enough to the place of business of the complainant to render it feasible or practicable for him to move his freight from the place it is unloaded by the defendant to complainant's place of business.

(e) In addition to your complainant, many other persons are seriously inconvenienced by the action of the defendant in timbering the crossing which has been heretofore, for many years, used at this point, including not only those who receive freight at this place, but as well passengers who arrive at and leave this point. The topography at and surrounding this place is such as that there is no other place near where the tracks can be crossed from one side to the other except this immediate place, which is now being closed by the Railway Company, in manner and form above set out.

All of which matters and things complainant says are violative of the duties owed by the defendant to this complainant, and as well violative of the laws of the State of West Virginia applicable to public service utilities.

[fol. 13] Wherefore the complainant prays that the defendant, The Norfolk & Western Railway Company, be required to answer each of the charges hereinabove set out; that after due investigation and hearing, an order may be made commanding said defendant to cease and desist from the violation of the laws referred to above, and be required to construct and keep open a suitable and proper crossing for the use of the shippers and public utility at this location, and be required to erect and construct here a suitable structure in which can be housed against weather such freight as is destined for this point and unloaded here, with suitable and convenient access to such station from either side of the tracks by proper grade crossing from the one side to the other of the said tracks; and for such other and further order as the Public Service Commission may deem necessary, reasonable and just in the premises.

Dated this the 13th day of December, 1921.

John Followay, Complainant, By Randolph Bias, His Attorney.  
Randolph Bias, Williamson, W. Va., Attorney for Complainant.

[fols. 14 & 15] STATE OF WEST VIRGINIA,  
*County of Mingo, To wit:*

John Followay, the complainant named in the foregoing complaint being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and that so far as they are therein stated to be upon information, he believes them to be true.

(Signed) John Followay, Complainant.

Taken, subscribed and sworn to before me this the 17 day of December, 1921.

(Signed) Edgar Chambers, Notary Public in and for said County. My commission expires on the 9th day of Oct. 1926.

[fols. 16 & 17] The Public Service Commission of West Virginia,  
Capitol Building, Charleston

A Meeting of the Public Service Commission of West Virginia Held  
on the 20th Day of December, A. D., 1921

[Title omitted]

#### ORDER DIRECTING RAILWAY CO. TO ANSWER

This day John Followay tendered a formal complaint against the Norfolk & Western Railway Company; upon consideration whereof



by the Commission, it is ordered that said complaint be, and the same is, hereby filed.

It is further ordered that the said Norfolk & Western Railway Company be required to satisfy said complaint or make answer thereto in writing within ten days of the service of a copy of this order and a copy of said complaint; and in default therein the Commission will proceed to investigate the matters and things set forth in said complaint in such manner and by such means as it may deem proper.

A Copy. Teste:

(Signed) R. B. Bernheim, Secretary.

[fol. 18] THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Case No. 1309

[Title omitted]

#### ANSWER OF DEFENDANT

Answering the complaint of John Followay, filed before this Commission, the Norfolk & Western Railway Company, a corporation, comes and says:

#### I

That it is without knowledge concerning the allegations contained in Section I of said Complaint, but calls for proof of the facts therein set forth.

#### II

That it admits the allegations contained in Section II of said Complaint.

#### III

That it denies all allegations of fact and inferences or conclusions therefrom, set forth in Section III of said Complaint, except as to those matters hereinafter specifically admitted, and denies that it owes to the Complainant or any others in like situation the duties and obligations set forth in said Complaint.

#### IV

That for answer to the recitals contained in said Complaint, this Respondent says:

(a). That McCarr is and has been for some years a stopping point for some of its trains and to which freight may be sent prepaid and released; that no agent is maintained at this point nor is there a station house or other building for the accomodation of freight or



passengers; that passenger trains Nos. 2, 8 and 29 may be stopped [fol. 19] on flag by incoming or outgoing passengers; that it is a shipping point for carload freight from the Allburn Coal Company.

(b). That as to the request for a crossing at this point, being M. P. 459 3500±, on the main line of the defendant as measured from Norfolk, such a crossing would be extremely hazardous for the reason that the tracks as located are on a 6 degree curve and on account of this curvature and the topography of the ground at this point, the view of this crossing from an approaching train would be very limited. An engineer on a westbound train could not see the crossing until within 293 feet from it, and from an eastbound train the crossing could not be seen until within 231 feet from it, and this from the fireman's side of the engine, on whom, due to the nature of his employment, is not the duty of constantly watching the track ahead. From the crossing, if the middle siding is blocked with standing cars, as is the case about 75% of the time, a person using the crossing would not be able to see an approaching train until he is directly on the crossing; nor could he depend upon hearing, for the reason that when the tipples of the Allburn Coal Company is operating, the noise from the machinery is greater than that from an approaching train. Further, such a grade crossing would mean the crossing of six tracks, and a road leading to the north therefrom would be at a grade of 15% to 20%.

(c). That as to the prayer that the defendant be required to erect and construct a suitable structure for the housing of freight destined for this point, it is submitted that this request is unreasonable because the volume of freight destined to McCarr is so small as not to warrant the facility demanded; that the complainant himself is practically the only receiver of LCL freight at McCarr, and that it would be an unreasonable burden upon the defendant to require the installation of facilities requested at the request of one individual or any individuals who receive an insignificant amount of freight [fol. 20] at the point in question; that McCarr is located 5,800 feet by county road east of the Town of Matewan, and the fact that Complainant is compelled to haul his supplies from the station at Matewan is not a circumstance which may be a subject of just complaint.

(d). Respondent further says that the recent repairs and improvements to its tracks at this point have no connection whatsoever to the convenience or inconvenience of Complainant, but was work done in the usual course of maintenance of its road bed. Respondent says that no crossing has ever existed at this point, although no objection has been raised to the Complainant moving his goods by hand from one side of its tracks to the other. Lately, however, complainant has been hauling with a wagon across the tracks at this point, and the posts erected by Respondent were placed for the purpose of making this practice impossible. As above recited, the conditions surrounding this point at McCarr make it imprudent and dangerous to permit such crossing, as plainly appears by the recital of facts herein-

above set forth, and which conclusion would be emphasized by an inspection of the premises.

(c) Respondent further says that it has in no way violated the laws of the State of West Virginia, as is charged in said Petition, but, on the contrary, in denying to Complainant the right to use its road bed and right of way as a crossing at the point indicated at McCarr, it has acted in wholesome regard to the spirit and letter of the laws of West Virginia in its purpose to protect the Complainant, the public, and its own passengers and employees from a dangerous situation that would ever be present in the event the prayer of the Complainant should be granted.

(f) And having fully answered the Complainant, Respondent prays that no adverse order be entered against it in this proceeding.

(Signed) Norfolk & Western Railway Company, By W. J. Jenks, General Manager.

[fol. 21] STATE OF VIRGINIA,  
*City of Roanoke, to wit:*

I, W. A. Carpenter, a Notary Public for the City of Roanoke in the State of Virginia, do certify that this day personally appeared before me W. J. Jenks, who being duly sworn, deposes and says that he is the General Manager of the Norfolk & Western Railway Company, that he has read over the foregoing Answer to be filed on behalf of the said Railway Company before the Public Service Commission of West Virginia, and the statements therein contained are true to the best of his knowledge, information and belief.

Given under my hand and notarial seal this the 31st day of December, 1921.

My Commission expires February 1, 1925.

(Signed) W. A. Carpenter, Notary Public. (Notary's Seal.)

[fol. 22]

Case No. 1309

JOHN FOLLOWAY

vs.

NORFOLK & WESTERN RAILWAY COMPANY

Formal Complaint

TESTIMONY ADDUCED AT WILLIAMSON, WEST VIRGINIA, BEFORE THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, G. R. C. WILES, COMMISSIONER ON THE 3RD DAY OF FEBRUARY, A. D. 1922

Appearances: The Complainant, by B. Randolph Bias, Attorney, Williamson, W. Va.; the Defendant, by Lucien H. Cocke, Jr., Attorney, Roanoke, Va.; J. W. Stanard, Reporter.

[fol. 23] Thereupon came H. T. HICKS, a witness of lawful age, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bias:

Q. Mr. Hicks, where do you live?

A. I live at Williamson, W. Va.

Q. What is your profession?

A. Engineer.

Q. Civil Engineer?

A. Yes, sir.

Q. How long have you been engaged in that profession, Mr. Hicks?

A. In all about four years.

Q. Have you recently been employed to do some engineering work at and near McCarr Siding, and particularly the rights of way and crossing of the Norfolk & Western Railway Company at that place?

A. Yes, sir.

Q. Have you made a map showing the location of the tracks, curves, the location of the store of John Followay, the plaintiff in this action, and the streets of Blackberry City, in which section is located this store?

A. Yes, sir.

Q. I wish you would exhibit that map to the Commission and [fol. 24] to the counsel for the respondent.

(The witness does so.) Map P. 24A.

Mr. Cocke: If Your Honor please, we would object to a map of this character for the reason, in the first place, it shows the streets laid off here, and, second, because there is no town located at this point, and we think the physical situation doesn't show any streets are opened up. This map would indicate this is being opened up for the use of a town; and on the further ground, if your Honor please, we doubt the accuracy of it.

(Objection is overruled.)

Mr. Bias:

Q. When did you do this work, Mr. Hicks—I mean approximately?

A. About a week or ten days ago, January 25th, to be exact.

Q. You were employed to do it by Mr. Followay, the complainant in this petition, were you?

A. Yes, sir.

Q. Do you know or was it shows to you the point on the right of way of the Railroad Company at which it unloads freight from its east-bound trains?

A. Yes, sir.

Q. Is that indicated on your map?

A. Yes, sir.

Q. How is it so indicated?

A. Well, I can only point it out; it is not indicated.

Q. Will you indicate with some letter or mark, Mr. Hicks, that point?

[fol. 25] A. Yes, sir. (The witness does so.)

Q. How have you indicated it?

A. With a cross mark "X" in red pencial, in a circle.

Q. A cross mark in a circle, haven't you?

A. Yes, sir.

Q. The point you have indicated is between the east-bound main line and the branch line of the railway that serves the Alma-Thacker Fuel Company, is it?

A. Yes, sir.

Q. And the freight in local shipments which is consigned to and unloaded at McCarr siding is thrown off or placed on the ground between the tracks at the point indicated, is that so?

A. So I was told, yes, sir.

Q. That was your information on it?

A. Yes, sir; I haven't seen it done.

Q. Mr. Hicks, assuming that your information on this is correct, approximately what distance is this freight unloaded on the ground from the store of Followay, the complainant or plaintiff?

A. About 200 ft.

Q. Now, where is Followay's store located from this point of unloading?

A. It's approximately north of the west-bound crossing.

Q. You mean approximately due north from this place where the goods are unloaded?

[fol. 26] A. I mean the point at which this point is located, it is north east of where the goods are unloaded.

Q. And with relation to the tracks of the Norfolk & Western where is it, speaking now from the point where the goods are unloaded?

A. It is across the tracks on the other side opposite his store.

Q. In other words, the goods are unloaded next to the river from the main track and the store is next to the hill, is that right?

A. Yes, sir.

Q. What did you find there with relation to means or facilities for crossing from the place where the goods are unloaded to the other side of the track, including the store of Followay?

A. Why, there is practically no way that a man could get across there anyway with a team and any man could get through there if it was opened up, but there are posts there on the other side by reason of which a man couldn't get through there with a team at all.

Q. Now, you say there are posts planted; you mean heavy timbers stuck in the ground?

A. Yes, sir. They are about five or six feet apart and about, I would say, approximately 15 ft. over from the center line of the west-bound main track.

[fol. 27] Q. How many of these timbers did you find there?

A. Why, they are spaced about I would say approximately 5 ft. on centers and for about 50 ft., probably ten of them.

Q. What is the apparent purpose of those timbers, Mr. Hicks, or what is the effect of having them there?

(Objected to by counsel for defendant as improper examination, because counsel has not laid his foundation for the question. This man did not testify he is acquainted with this neighborhood.)

Mr. Bias: I expect to show that, Mr. Cocks.

(Objection is overruled.)

The Witness: Why, I should think that it would be to block traffic from using the crossing, is the way it seemed to me.

Q. That is the effect of putting them there, isn't it?

A. Yes, sir.

Q. Are these timbers at a point along the right of way where the tracks have in the past been crossed by vehicles?

A. Why, so I have been told. It would indicate from the looks of the approaches on each side that it has been crossed.

Q. Mr. Hicks, from an engineering viewpoint, what reason is there why a grade crossing for the accommodation of shippers who [fol. 28] have freight consigned to them at this point, could not conveniently and economically have a proper crossing here? I mean is there anything in the topography or grade there that makes peculiarly bad a crossing at this point?

A. Why, the grade is slightly steep, pretty steep on the upper hillside. After leaving the track about 100 ft. it is steep for about 70 ft., that is, it's 13.8 per cent for about 70 ft., about 100 ft. from the upper side of the crossing.

Q. You are now talking about the slope of the land after you get away from the right of way?

A. After you get away from the tracks, yes, sir.

Q. The question I asked, speaking of a grade crossing over the tracks of the railroad company itself, is there anything from an engineering viewpoint, that makes this impossible or difficult?

A. No, sir.

Q. Then, as I understand you it would not be difficult or expensive to make and maintain a short grade crossing of this kind from the grade crossing to the hillside?

A. I don't think it would be expensive, no, sir.

Q. In its answer the respondent or defendant has contended that a grade crossing was impracticable or hazardous because of the inability of its engineman to see this grade crossing and avoid accidents [fol. 29] to those using it. Did you attempt to get the measurement, the distance that could be seen at this point?

A. Yes, sir, I did.

Q. Assuming that a train is on the west-bound main line, coming from the east of course, at what distance east of this crossing could the crossing or those using the crossing be seen by the engineman?

A. It could be seen on the upper side for a distance of 230 ft.

Q. You mean persons on the crossing next to the hill could be seen that distance from the engine?

A. Yes, sir, and on the lower side—you could see the lower side before you could see the upper side; on the upper side you could see 230 ft. and on the lower side 480 feet.

Q. Then, as I follow you, Mr. Hicks, assuming a train is coming westward on the westbound main line, the trainmen could see one on this crossing, if next to the hill on the crossing, 230 ft. and if next to the river and still on the crossing, 480 ft., is that right?

A. Well, there is a question there as to being on the curve. What do you mean by trainmen? You see the engineer could see—

Q. I mean the engineman.

A. Yes, sir, the engineer could see 480 ft. on one side and 230 ft. on the other.

[fol. 30] Q. And of course the one using the crossing could likewise see the approaching engines for the same distance?

A. Yes, sir.

Q. Now, assume an eastbound train going towards this crossing, for what distance can the engineman on his train see this crossing?

A. The engineman can not see the crossing at all until he gets practically on it, because it curves the other way.

Q. How about the fireman?

A. The fireman could see it at a distance of 320 ft. on the upper side and 670 ft. on the lower side.

Q. Then, the eastbound trainmen could see the crossing for a greater distance than the westbound train could?

A. Yes, sir.

Q. What is the character of the ground at the place where the goods are unloaded? First, is there any structure or building or shed for the protection of goods?

A. No, sir.

Q. What is the character of the ground?

A. What do you mean by "character of the ground"?

Q. Is it smooth or rough?

A. It is right between two tracks, the Alma Thacker Fuel Co. siding and the main eastbound track and it widens out about 4 ft. [fol. 31] in there; right at the point where the goods are unloaded the track is shifted over about 4 ft. and it gives you about 4 ft. more than between the ordinary standard centers of track.

Q. Then, there is a space of six or eight feet between tracks where the goods are unloaded?

A. Yes, sir.

Q. How about the condition of the surface of the earth there over towards the river?

A. Between Alma-Thacker siding there is a space there that could be used for unloading; I don't know whether it is used or not.

Q. Is there plenty of space there?

A. Yes, sir.

Q. So there is a suitable location for a station or freight house or some structure for the protection of goods there?

A. Yes, sir.

Mr. Cocke:

Q. Do you know who owns that property?

A. I do not.

Mr. Bias:

Q. I spoke of the right of way of the Norfolk & Western. I mean is there a space there on that right of way for the construction of such a place?

A. I do not know. I don't know how much right of way they have there.

[fol. 32] Q. How about the other side of the track next to the hill, is there ground there on which a shed or station could be built?

A. Yes, sir, it could be.

Q. Without unusual expense?

A. Yes, sir, I would say so.

Q. How far is this McCarr siding, so-called—this crossing we are talking about, from the station at Matewan, if you know?

A. I didn't measure it; I would say about a mile or probably a little more, if anything.

Q. You are speaking by rail or by county road?

A. I speak by rail.

Q. Is it more or less distance by the county road from Matewan?

A. It is more.

Q. Is there a crossing on the river side to the hillside of the tracks available for vehicles to carry across the tracks freight unloaded at the McCarr siding—I mean any other than the place we are talking about?

A. Not anywhere within—the nearest one I am familiar with is, I would say, approximately one mile above and below I don't know how far it is.

Q. Now, you say there is a grade crossing about a mile east and you don't know where the one is west?

A. No, sir.

[fol. 33] Q. The point I am getting to is this, is there any crossing there at which Mr. Followay could get his freight from the McCarr siding where it is unloaded from eastbound trains to his store?

A. I don't think so. I am sure there is not.

Q. You, yourself, know nothing about the shippers or the quantity of freight or anything of that sort, do you?

A. No, sir.

Q. On your map which you have exhibited, and which we will file, if the Commission please, which I now file, I observe you have shown in outlines certain roads and streets. Where did you find these or get the information for them?

A. I got the information from a layout made of the town site of Blackberry City, which is at this particular location, made by D. M. Good, engineer, at Williamson, in June, 1920. It's a layout of the Blackberry City.

Q. Blackberry City is a town site at this point, is it?

A. Yes, sir.

Q. And your map shows the streets and roads running through this city to and at this crossing, is that right?

A. Near the crossing, yes sir.

Q. The map is accurately made from the other map?

A. Yes, sir.

Q. Approximately what distance is it from this crossing we are [fol. 34] talking about to the Mingo County public road?

A. The nearest point by road, the way this crossing shows, the proposed route, would be about 1,000 ft.

Q. And the county road is on the hill above the tracks, is it, to the left going east?

A. Yes sir.

Q. Approximately what distance is it, air line, from the Norfolk & Western tracks at this crossing point to the county road?

A. Approximately 500 ft.

Q. Did you go over those streets or roads there to see whether or not they are used and useable for vehicles?

A. Yes, sir.

Q. What did you learn?

A. I learned they could be used; they are not in the best condition, but they could be used very easily.

Q. Did you see evidences they have been in the past used by vehicles?

A. Yes, sir.

Q. Mr. Hicks, from the point of the cross in the circle which you indicated as the place of unloading of freight at McCarr siding, approximately what distance is it to the West Virginia end of the bridge which spans Tug River at this point?

A. Approximately 180 ft.

Q. What is that bridge?

A. It is used by the Allburn Coal Company for carrying coal across to the tippie—the overhead is used for that purpose, and it seems that [fol. 35] the bottom of the bridge is used for traffic, vehicular traffic.

Q. It is a double decker bridge, is it?

A. Yes, sir.

Q. The top deck being a railway bridge and the bottom a vehicle bridge?

A. Yes sir, it seems so.

Q. You say it is 180 ft. from this point of unloading?

A. Approximately.

Q. Did you observe or were you asked to observe about the Kentucky end of the bridge and the approaches thereto?

A. No, sir.

Q. What is the topography and condition of the ground from the river side of the crossing, the point where the freight is unloaded, to the West Virginia end of this bridge, with relation to being useable by vehicles?

A. It could be used all right; it is fairly level.

Q. Then, as I follow you, the only reason why vehicles do not and cannot cross the tracks at this point is because of the timbers placed there for the apparent purpose of preven-ing the use of it?



A. They could get across there, just the rails there, but that is the only thing that keeps you from getting across there with wagons.

Q. No facilities there for crossing?

A. No, sir.

[fol. 36] Q. The only thing that actually prevents crossing by vehicles is the timbers there for that purpose?

A. Yes, sir.

Q. How familiar are you with other grade crossings in this section, with relation to the distance to be seen from engines and the danger of using, etc?

A. I examined the crossing at the West Williamson tunnel; the distance this side of the West Williamson tunnel is about 180 ft. from the end of the tunnel to the crossing. That is as far as can be seen by trainmen and people crossing the crossing, 180 ft. And at Matewan I examined those crossings also, and I also examined one near Rose siding.

Q. Is that the one east of McCarr siding?

A. Yes, sir.

Q. Having examined these other grade crossings, Mr. Hicks, will you tell the Commission whether a grade crossing at McCarr siding would be more hazardous or dangerous for those using it than the other crossings you have seen in this section along these tracks?

A. I don't think it would be more dangerous than the crossing at West Williamson tunnel or either of the two crossings at Matewan, considering through trains. Of course trains stopping at Matewan, [fol. 37] they naturally slow up for the station and it is not quite so dangerous, but for a through train I would say I would say the one at McCarr would not be any more dangerous than the ones I have mentioned.

Q. What would be a proper facility to avoid the dangers of this grade crossing, to be used by the railway company?

A. Put in an electric bell.

Mr. Cocke: We object to any questions of this character, because no grade crossing has been established at this point, and we object to any evidence tending to the establishment of a grade crossing there.

(Objection is overruled.)

The Witness: Or use crossing signals.

Mr. Bias:

Q. What other device is employed or what other thing is done, ordinarily, to warn those using grade crossings of the approach of a train?

A. Why, a whistle post or something like that.

Q. By that you mean a certain and safe distance from the proposed grade crossing a post would be constructed by the railroad company, which should indicate to the engineman he should blow his whistle, is that right?

[fol. 38] A. Yes, sir.

Q. Assuming that facility were installed at this grade crossing, what would you say of the danger of accidents to those using it?

A. I would say it wouldn't be more dangerous than the crossings I have heretofore mentioned.

Q. How about the average grade crossing in this county, so far as your acquaintance goes with them?

A. Well, I have never made any particular investigations, and I wouldn't like to make a statement of that kind, except on these particular ones I have mentioned.

Q. In approaching a curve, such as is east and west of this proposed crossing, you have said the engineman cannot see the crossing until he gets near to it, when the train is going a certain direction. Of course that means when he is on the outside of the curve?

A. Yes, sir.

Q. That is so of all grade crossings, isn't it?

A. Yes, sir.

Q. How about the grade crossing in the town of Williamson, is that true of that crossing?

A. Yes, sir.

Q. Then, the lookout for the crossing necessarily is for the fireman and on that side of the train?

A. Yes, sir.

[fol. 39] Cross-examination.

By Mr. Cocke:

Q. Mr. Hicks, are you a graduate of any engineering school?

A. Yes, sir.

Q. What?

A. Virginia Military Institute.

Q. In what year?

A. Class of 1918.

Q. Have you had any experience in engineering for railroad companies?

A. Why, I have never worked for a railroad company; I have done quite a lot of railroad work in connection with the location of sidings and different things like that.

Q. I notice from your map that you have certain streets laid out—Front Street, Church Avenue, Central Avenue, Mingo street. When you were on the ground at McCarr did you see these streets and avenues laid out and in actual use—are they graded streets?

A. No, sir, the streets are not graded. It is like all town locations; the lots are staked off and streets located.

Q. The streets then here are located by stakes?

A. Yes, sir.

Q. Have they actually been used as Front Street, etc. by vehicular traffic?

A. I wouldn't say Front street is being used by vehicular traffic.

[fol. 40] Q. Is Church Avenue?

A. I wouldn't say whether it has been used or not.

Q. Has Central Avenue?

A. I wouldn't say whether those streets have been used, but I will say they can be used. The topography is such that they can be used.

Q. Has Mingo Street been used?

A. That is the county road; it has been used.

Q. I notice a dotted line on your map leading to the east from the front of John Followay's storehouse. Does that indicate a road or a street that is in use?

A. That indicates the roadway or passageway as proposed.

Q. That is not in use, then, not actually opened?

A. Well, there is no necessity or reason for using that now; nothing in use there now.

Q. And the extension of that road to the east on a curve and reaching finally Mingo street, which you say is the county road, that is no more opened up than the dotted part of the line. You start off with the dotted line and finish up by steady lines reaching the county road. Is that road in use?

A. That is the location of a street; I don't know whether it is in use or not; I don't suppose there is any necessity for coming around that way.

Q. How many citizens has the town of Blackberry City?

A. I couldn't say.

Q. How many houses in that town?

[fol. 41] A. I couldn't say.

Q. How many houses did you see in that neighborhood of Followay's store, residences occupied by persons?

A. I didn't count any; I saw several; I couldn't make a statement as to the number.

Q. Where are they located?

A. At various points in this town site on this map; some few at that particular place and as shown on that map and on this map of which that is a part; several located at various points on this.

Q. Would you say two or three or 20 or 25?

A. I wouldn't make a statement as to the number, because I didn't count them.

Q. How many houses did you locate on your map?

A. I only located one.

Q. Do you know the location of the north right of way line of the railroad company near McCarr siding?

A. Only so far as shown by this map, which was actually surveyed about one year ago.

Q. Did you make that survey?

A. It was made by D. M. Good.

Q. You did not assist him in making that?

A. No, sir.

Q. Is that map on file in the county court house?

A. I would say it is; it is supposed to be; sometimes they get misplaced over there.

Q. You don't know whether it is filed or not?

A. I do not; I didn't see it, I would say it is though; I would think it is.

Q. Do you know for what purpose that map was made, of your own [fol. 42] knowledge?

A. Well, it was made for the Blackberry Land Company.

Q. You mean you see on the map it was made for that?

A. Yes sir.

Q. You don't know it was made for them or for what purpose it was made?

A. No.

Q. Can you state that map was made in expectation of building a town at that point?

A. I should think so.

Q. Do you know as a matter of fact that was the expectation of that land company?

A. I wouldn't say; I should think so; I can't see anything else it could be made for.

Q. You think because you see a map locating streets there must be streets?

A. If I had a piece of property I wanted laid out in a town site I would naturally have it laid out that way.

Q. From what data did you put in the north right of way line of the railway company, and why didn't you put in the south right of way line?

A. The north right of way line I took from this map, and the south right of way line was not shown on this map and I didn't think it was necessary.

Q. Can you swear to the accuracy of that map?

A. No, sir, I can not.

Q. You located the storehouse of John Followay on this map, did you not?

A. Yes sir.

Q. Did you locate that from actual measurement?

[fol. 43] A. From this map?

Q. From the map of D. M. Good?

A. Yes, sir.

Q. But you did not make an actual measurement of the distance of the storehouse from the right of way line nor the distance of the storehouse from the tracks of the Norfolk & Western?

A. No sir.

Q. So you are not prepared to state that that location is accurate with reference to the right of way line, are you?

A. No sir.

Q. You have entered on your map a red cross with a circle around it, indicating the point at which freight deliveries are made by the Norfolk & Western Railway Company to Followay. What was the basis of your testimony on this, did you see freight delivered at that point?

A. Mr. Followay's statement of where the freight was delivered.

Q. But you know nothing further as to freight deliveries except what he told you?

A. I didn't see anything, no sir.

Q. You don't know whether it is delivered between the eastbound main track and the Alma-Thacker branch or whether it is on the south side of the Alma Thacker branch?

A. Only his statement as to that.

Q. You have indicated on your map in dotted lines what appears to be a roadway running to the west of Followay's store. Is that [fol. 44] roadway opened and used?

A. Why, it shows signs of having been used.

Q. Now, what pathway or trail or road does Followay use from his store to this point of crossing?

A. Why, from the store he comes west to this dotted lines approximately on the right of way and down towards the east to the junction of this proposed road to the east, and then going west to the point of crossing as indicated on the map.

Q. Did you make a topographical map of that road?

A. I took levels at different points on that.

Q. What was the result of that investigation as to the grade of that road?

A. The result was as shown on the profile, on the map.

Q. Won't you indicate the percentage of the grade and the distance at which that percentage applies, beginning at "A" and going up as high as you can?

A. It was 8.5 per cent grade from the upper side of the track, marked point "A" on the map, a distance of about 50 ft. and 13.8 per cent grade for 40 ft. and a level grade for 40 ft. and a plus .8 per cent grade for 50 ft. and plus 30 per cent grade for about 60 ft.

Q. Can you tell me about what point on the map that description of grade will bring you to?

A. Approximately the right of way line as shown on the proposed road.

Q. But it does not go farther in the direction of the county road? [fol. 45] A. No, sir.

Q. Did you note any extension of the dotted lines in the direction of the county road whereby the road to the west of Followay's reaches the county road?

A. I did not follow that road out to see if it lead into the county road.

Q. You don't know what roadway Followay uses now to reach the county road?

A. I do not.

Q. Do you know the distance between the right of way line, the north right of way line, and the front of Followay's store?

A. I do not know the actual distance.

Q. I notice that your map shows only one building and that is the storehouse of John Followay. Were there any other buildings at that point and in his neighborhood?

A. Yes sir.

Q. Could you indicate those on your map in red?

A. I wouldn't like to.

Q. Do you know how many there were?

A. I wouldn't say how many.

Q. Mr. Hicks, what prevents the engineman on a train approaching this crossing from seeing the crossing and what prevents a person on the crossing from seeing an approaching train?

[fol. 46] A. It's a cut on the upper side of a cliff.

Q. That cliff is not shown on your map, is it?

A. No sir.

Q. Did you put a level on that cliff to ascertain its height above the tracks?

A. Only where the proposed road was supposed to be.

Q. Did the proposed road touch the cliff you have in mind?

A. Well, it is partly over the cliff.

Q. Would the proposed road reach the top of the cliff, the summit?

A. I took my levels on the road as shown there, where it seems to have been used and it seems to have been kind-a-graded out there and not on the top of the cliff.

Q. So it does not reach the summit of the cliff?

A. No sir.

Q. How did you determine these proposed roadways—were there stakes there to indicate them or was there any land mark you could relate these roads to?

A. Only by showing signs of traffic.

Q. And the lines you have used on your map follow the lines as appearing on the Good map and do not follow the measurement on the ground?

A. I do follow the measurement on the ground in so far as I have shown the proposed road in that dotted line.

Q. To what limits did you follow the Good map in making yours?

A. Only so far as getting the street lines and the right of way [fol. 47] lines, etc.

Q. Did the Good map connect up with the road indicated by dotted lines on your map, and did the Good map show those same extension- of that same road by dotted lines?

A. It did on the east side of the crossing.

Q. But not on the west side?

A. No sir.

Q. So the dotted lines on the west side are your own additions?

A. Yes sir.

Q. And those dotted lines were placed in there as a result of your measurement of the road as it related to other land lines to the storehouse of John Followay, and the right of way lines of the Norfolk & Western and the street lines called Front Street?

A. Yes sir.

Q. Did you establish the lines of Front Street?

A. No sir.

Q. You could not establish Front street then?

A. No, I did not.

Q. How did you establish on your map the crossing of the tracks of the Railway Company you have indicated by dotted lines,—what you term the proposed crossing?

A. Why, by actual measurements.

[fol. 48] Q. From what point, what was your starting point?

A. The point of switch of the switch leading to Alma-Thacker Coal Company and Allburn Coal Company.

Q. So the proposed crossing is related to the switch of the Allburn Coal Company and is correct as related to that point?

A. Yes, sir, and as related to the Alma-Thacker Fuel Company.

Q. The distance between the point of crossing of the Allburn Coal Corporation and the Alma-Thacker branch is as established by actual measurement?

A. Yes, sir.

Q. Your map indicates that the bridge across Tug River is a wagon bridge. What was the basis for this statement?

A. The lower deck of that is used by wagons.

Q. Did you see wagons use that bridge?

A. Yes, sir.

Q. Do you know whose wagons they were?

A. I do not.

Q. Did you see a number of wagons cross there?

A. No sir.

Q. Did you see one or two?

A. I wouldn't say how many I saw; I saw wagons cross there.

Q. What is the nature of the front of that bridge?

A. I didn't examine it.

Q. Did you cross it yourself?

A. No sir.

Q. Then, you did not see wagon tracks on the bridge but you did see several wagons cross?

[fol. 49] A. I wouldn't say several; I saw a wagon cross.

Q. You think you only saw one wagon possibly?

A. Yes sir.

Q. Do you know as a matter of fact that the floor of that bridge is in part taken up by the rails of a tram-way?

A. I did notice rails on it.

Q. Did you see a mine car carried across the bridge on the upper deck?

A. On the upper deck, yes sir.

Q. Do you know the width of that bridge?

A. I do not.

Q. Was it broad enough for two wagons, one to pass another, on it?

A. I can't say.

Q. Do you know the duties of a fireman and engineer on the railroad train?

A. I do not.

Q. Do you know whose duty it is as between the engineman and fireman to keep a lookout?

A. I do not.

Q. As to making freight deliveries at this point, these tracks can be crossed on foot, can they not, at the point of the proposed crossing?

A. I don't see why they couldn't; they are like all other rails.

Q. There is no reason why they shouldn't be crossed on foot?

A. No, sir.

[fol. 50] Q. Those posts are not in position to prevent passageway by foot, are they?

A. No, sir.

Q. You know how wide those posts are, the distance between one post and another?

A. I didn't measure them but I would say about 5 ft.

Q. That is ample distance to pass a barrel of flour, isn't it?

A. I don't know.

Q. Is there any reason, to your knowledge, why a horse drawn vehicle cannot approach the north track of the railway company and take a position on the north side and receive loads of freight?

A. I should think they could.

Q. And if freight is put off from westbound train, it could be loaded in a wagon without the necessity of crossing the track, could it not?

A. I should think so.

Q. And if freight is put off on the south side it could be loaded to the wagon by taking the stuff across three tracks, could it not?

A. Yes sir.

Q. When you visited this point, Mr. Hicks, were freight cars standing on the middle siding?

A. No, there was none at this point.

Q. You don't know, then, how often freight cars are standing on that middle track, do you?

A. I do not.

Q. Were coal cars standing on the tracks of the Allburn Coal Corporation?

A. Yes, sir.

Q. Was that a solid line of cars?

A. No, not a solid line.

Q. Was that crossing of those two tracks as indicated by you looked at that time or open when you saw it?

A. It was open at the time I saw it.

Q. Both tracks were clear to the extent this crossing indicated?

A. Yes, sir.

Q. Were there cars on either side of the proposed road?

A. Why, there was cars above and below the proposed crossing.

Q. Did it indicate those cars had been broken for the purpose of admitting travel over this proposed road, or did it indicate they were placed without regard to the use of the crossing?

A. Well, I would say they were shoved in there for use of the coal company and to let them drop down as they needed them.

Q. There was nothing to indicate they had been broken for the purpose of clearing that crossing?

A. No, sir.

Q. You spoke of certain safety devices. You have indicated bells placed at the crossing, and a whistle post. Do you think of other safeguards that ought to be used at this point?

A. Well, you could use a regular crossing signal.

Q. Do you think a watchman would increase the safety?

A. I guess so.

Q. Do you think watchman controlling gates would increase the safety?



A. Yes, sir.

Q. You compared this crossing with the West Williamson tunnel and Matewan and Rose siding east of McCarr. Are those the only crossings that you have personal knowledge of along the line of the Norfolk & Western?

A. They are the only ones I taken any measurements on.

Q. But you have taken measurements on these?

A. Yes, sir.

Q. Have you those figures as to these crossings?

A. No, sir, I have not with me; I have them in the office.

Q. But your general statement is that those crossings are no more dangerous or hazardous than the one proposed at this point?

A. I stated that Matewan crossing, considering a through train, it was no more dangerous than the proposed crossing, and I stated the others, at the West Williamson tunnel, as to how far you can see—

Q. Do you know how many passenger trains stop at McCarr?

A. I do not.

Q. Is that a regular stop for passenger trains?

A. Why, some passenger trains stop; I don't know whether it is a regular stop or not.

[fol. 53] Q. Do you know whether or not that is merely a flag station, or not?

A. I do not.

Q. If that is a flag stop and a passenger train is not flagged, then that train becomes a through train, so far as this siding or stopping point is concerned, isn't that true?

A. I should say so.

Q. Between the Alma-Thacker branch and the bridge I think you have stated that traffic by vehicles can be maintained without difficulty. I note on your map something I don't understand, on the south side of the Alma-Thacker branch, the siding of the Allburn Coal Company. Won't you explain those? Now, there are two lines that cross the road as indicated. What are those?

A. That indicates the abutment of the bridge.

Q. But that is no obstruction of the roadway?

A. No, sir.

Q. The only obstruction then over the two tracks, are the tracks of the Allburn Coal Company?

A. I don't consider the Allburn Coal Company tracks as obstructions.

Q. Then, there is no greater obstruction along those dotted lines than those tracks?

A. No, sir.

Q. Is that level in between the Alburn Coal Company tracks and [fol. 54] the N. & W. or practically so?

A. No, sir.

Q. You have stated, Mr. Hicks, a station could be built at this point—a station house—without unusual expense. Do you mean that the grading for the location of such a house would not be great?

A. At which point are you speaking of?

Q. At any point you say a station house can be erected.

A. On the lower side there would have to be no grade practically and on the upper side there would be some grading, not a great amount.

Q. You have stated you don't know the boundary of the right of way at this point?

A. No, I do not.

Q. You don't know whether the railroad company would have to acquire property for the erection of a new station house, do you?

A. No, I do not.

Q. You don't know what it would cost to build a station house at this point, do you?

A. No, sir.

Q. You don't know whether an agent would have to be maintained if a station house were put in, do you?

A. Do not.

Redirect examination.

By Mr. Bias:

Q. A station house could be erected there for \$1,000 ample to prevent damage of goods from weather, such goods as are unloaded here, couldn't it?

[fol. 55] A. Easily I should think.

Q. You have been asked if you saw more than one wagon crossing this bridge. Do you know why you didn't see more than one wagon cross the bridge?

A. They can't cross on the upper side.

Q. Was it because of the timbers the railroad company put there to prevent wagons from crossing the tracks, also prevented them from crossing the bridge?

A. I can't say.

Q. That would prevent it, wouldn't it?

A. Yes, sir.

Q. There would be very little occasion to come to the south side of the tracks, if you couldn't cross the tracks, is that right?

A. I don't see what they would come there for.

Q. You have been asked about the accuracy of your map. You have said the greater part of this map is copied from one made by D. M. Good?

A. Yes sir.

Q. Do you know Mr. Good?

A. Yes sir.

Q. Is he a competent engineer?

A. Yes sir.

Q. And has had a great many years' experience?

A. Yes, sir.

[fol. 56] Q. Have you any reason to question his map?

A. No, sir, this map was made by Mr. Gurley, who was at that time employed by Mr. Good and he is an old railroad man, and his

work has always proven very accurate where I have had occasion to check it.

Q. In other words, the Good map was made by Mr. Gurley, a railroad man?

A. Yes, sir, a railroad engineer.

Q. It is customary for one engineer to accept the work of another engineer, when it is known to be accurate, is it not?

A. Yes sir.

Q. You have indicated and it has been testified to as to some dotted lines showing a proposed road; I understand it east of the dotted lines is taken from the Good map and is verified by the actual use of the ground as you found it?

A. Yes sir.

Q. And the ones to the left of Followay's store is located by you on your map and not found on the Good map?

A. Yes sir.

Q. You located that from the use of the ground as you found it?

A. Yes sir.

Q. The dotted lines shows the use of the ground as you found it?  
[fol. 57] A. Yes sir.

Q. Not used by the obstructions the railroad company placed there?

A. Yes sir.

Q. Have you shown on this map this string of timbers placed there by the railroad company?

A. No sir.

Q. Indicate that and mark the timbers on the map?

(The witness does so.)

Q. Did you see the mail cranes at this point, Mr. Hicks?

A. There was one mail crane west of the proposed crossing.

Q. And near it?

A. Yes, sir.

Q. Mr. Hicks, have you had occasion to examine casually and look to the grade crossings over the Norfolk & Western from here to Nolan?

A. Yes sir.

Q. Having the recollection of those crossings in mind, how do they compare with relation to hazards or use with the proposed crossing at McCarr siding—how about the West end of the William-son tunnel?

A. The west end you can see a considerable distance, to the best of my memory, although it is slightly on a curve and a pretty heavy cut when you come out of the tunnel.

Q. Would you, from recollection, say the trainman can see that crossing as far as the McCarr crossing?

A. I wouldn't say how far he can see.

Q. How about the next train crossing, about the town of Goodwin, do you remember that one?

[fol. 58] A. Yes sir.

Q. And the one at Chattaroy?

A. Yes sir.

Q. From your recollection of the grade crossings in this county, over the tracks of the Norfolk & Western, is the McCarr crossing any more hazardous than these grade crossings, in your opinion?

A. I wouldn't like to say, as I never observed them very closely, except the ones mentioned.

Q. Have you indicated the timbers I mentioned on that map?

A. Yes sir.

Recross-examination.

By Mr. Cocke:

Q. You have entered in red the location of certain posts. Is that location done as a result of measurement?

A. No sir; that is the proper relation with respect to the point of crossing; as to the distance over to the other line, I wouldn't say that is exactly correct.

Q. Your red line is more extended to the east than to the west. Was that done on purpose? Is there more posts to the east than to the west?

A. There is a little bit of a rise here (indicating on the map); you might cross here further than you could cross on that side.

Q. So there are more posts to the east than to the west?

A. Yes sir.

[fol. 59] Q. Speaking of the Good map, you say it is the habit of an engineer to accept the work of another engineer? Did you mean to say that?

A. I didn't say that. I say it is the habit of one engineer to accept the work of another competent engineer.

Q. If you were sent on to a location to make a survey, and you find an engineer whom you know and whom you believe is a good engineer, has done that work, do you take that work and hand it over to your employer and say that is your work and say you accept that?

(Objected to.)

A. I wouldn't accept the work of an engineer unless I knew him and unless I knew who made the map and who had charge of the work.

Q. Isn't it a fact if you were going to accept someone else's work you would establish his corners, etc. and check that?

A. Well, depending on the relative importance of that particular part.

Mr. Bias:

Q. You did what you were employed to do up there and took what you were told to take?

A. Yes, sir.

(The map referred to heretofore is here filed, and marked "Hicks map.")

(Here follows "Hicks map," marked side folio page 59a.)

The witness is excused.

Thereupon the further hearing is adjourned to 2 o'clock P. M. of this day.

[fol. 60]

Afternoon Session

Friday, February 4, 1922.

Present: Same parties.

Thereupon came JOHN FOLLOWAY, a witness of lawful age, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bias:

Q. You are the complainant in this proceeding, are you?

A. Yes, sir.

Q. Where do you live?

A. At McCarr siding or Blackberry City.

Q. Where is that?

A. Well, that is about a mile and a quarter east of Matewan.

Q. In this county?

A. Yes sir.

Q. How long have you lived there?

A. I have lived there ten years in July.

Q. In what business are you engaged?

A. Mercantile.

Q. How long have you been engaged in the mercantile business there?

A. Nine years, be ten years this spring.

Q. Then, all the time you have lived there you have operated a store?

A. Yes sir.

[fol. 61] Q. How long has there been a town or a town and town site known as Blackberry City where you live?

A. Well, that was laid out in a town something,—I don't know exactly, but it's been 12 or 13 years.

Q. When was the bridge which spans Tug River at this point constructed?

A. Well, it was constructed or started in the year 1905, I believe.

Q. How soon after the erection of this bridge was the town of Blackberry City laid out as such?

BLUEPRINT  
TOO  
LARGE  
FOR  
FILMING



A. Well, two years, I expect.

Q. Have you known it from that time to the present?

A. Yes sir.

Q. Are you a representative of the owners of that town site?

A. Yes sir, always have been a special agent.

Q. Who owns that town site?

A. The Blackberry Land Company.

Q. Who is that?

A. J. C. Miller is President and I don't know who the balance of the company is.

Q. You say you have been their local agent there to look after the property and sell lots?

A. Yes, sir.

Q. For it all the time you have been there?

A. Yes sir.

Q. Approximately how many people live in what is known as Blackberry City?

A. Well, I don't know hardly; I suppose something like 30 houses, maybe more.

[fol. 62] Q. Probably more than 100 people live there?

A. Yes sir.

(Objected to.)

Q. Where is your store with relation to the particular point called McCarr siding?

A. Well, it's on the east side of the railroad.

Q. You mean the side next the hill?

A. Yes sir.

Q. And about how far from the right of way of the Norfolk & Western is your store located?

A. Right at the edge of the right of way.

Q. But on ground owned by you?

A. Back of it, yes sir.

Q. Your store is on your ground, is it?

A. Yes sir.

Q. How long has your store stood where it is now standing?

A. Well, I believe it's been ten years since I started that store building.

Q. All the time you have operated the store in that building where it now is?

A. Yes sir.

Q. What sort of store do you operate and have you operated in past years?

A. A general store, mostly groceries and feed.

Q. Approximately what value of stock do you ordinarily have?

A. Well, at the present time my stock is something like \$4,500.00.

Q. What is the average through a period of five years?

A. Well, all through the war time it run as high as \$9,000.

[fol. 63] Q. What has been the average value of the stock?

A. Something like \$5,000 I suppose.

Q. Give the Commission some idea of the volume of your trade,



approximately how much stuff do you sell in dollars and cents monthly or annually?

A. Well, I believe last year I sold \$58,000 worth of stuff.

Q. Approximately \$5,000 a month then?

A. Yes sir, last year.

Q. You mean 1921?

A. Yes, sir; that was in 1920 I spoke of, not 1921; not quite so much in 1921, about \$48,000.

Q. Then, your sales as I get you for 1920 would average about \$5,000 a month and for 1921 about \$4,000 a month?

A. Yes sir.

Q. That means that you turned your stock on an average of about every month?

A. Yes sir.

Q. How do you get your goods from the market to your store, how do they reach you?

A. They reach me on the west side of the railroad.

Q. How do they come to McCarr siding?

A. By car, carload lots, local shipments, over the Norfolk & Western Railway.

Q. And where do you do most of your buying, east or west of McCarr siding?

A. Altogether west, mostly.

[fol. 64] Q. Now, when your freight is bought from the dealer, wholesaler or jobber, it is consigned to you where?

A. At McCarr siding.

Q. Is that a regular freight siding of the N. & W.?

A. Yes sir, has been ever since the Pike Collieries was located at the point on the other side of the river.

Q. That means about 15 years?

A. Yes sir.

Q. Is it also a stop for passenger trains?

A. Yes sir.

Q. Do any of the passenger trains regularly stop at this place?

A. Well, I can't say; some of them stop there.

Q. Do you know whether it is a flag stop or not?

A. I do not.

Q. Approximately what quantity of freight, that is freight charges, do you get monthly,—how much do you pay the railroad company monthly as freight charges, on the average?

A. I have never figured it up.

Q. Tell the Commission as nearly as you can what it amounts to.

A. I know in the month of December I got a carload of feed and flour and a carload of hay, and the freight on one was \$132.00 I believe, and the freight on the other one, I don't know just exactly, but near the same thing; that is the two cars but that is not very often that I buy a great deal, but the locals lots of times I get 60, 80 or 100 bags of feed at a time, may- 20 bbls. of flour and meal, etc. [fol. 65] in local shipments, as I can't afford to buy everything by the car.

Q. About how much per month do you pay the Norfolk & West-

ern Railway Company as freight charges on freight delivered to you at McCarr siding?

A. I wouldn't want to make a statement without I know what it is.

Q. Tell what you believe it to be.

A. I think it would average \$300.00 or more a month; lots of months more.

Q. But you don't know what the average would be?

A. No sir.

Q. And that freight you say is always stuff you buy from the west and unloaded on the west side of the tracks?

A. Yes sir.

Q. Where does the freight which comes from the east, where is it unloaded?

A. On the east side of the track.

Q. On the side your store is on?

A. Yes sir.

Q. But you have none coming from the east?

A. No sir.

Q. Your freight is always unloaded on the river side of the tracks?

A. Yes sir.

Q. In order to get from the place where it is unloaded, what do you have to do?

A. Well, when we could haul it we hauled it, but we are carrying it at the present time, hiring men to carry it.

[fol. 66] Q. In all events you have to cross the tracks?

A. Yes sir.

Q. How many tracks of the Norfolk & Western between your store and the point where the freight is put on the ground?

A. Well, there is two points they unload it; one is a kind of station, the ground filled up and made smooth between the main line and siding and the Alma Thacker switch, between the Alma Thacker and the east bound main line they put some freight in there, and lots of times they take it over on the Alma-Thacker siding.

Q. When it is put over next to the river on the Alma-Thacker siding, how many tracks to you have to cross to get to the store?

A. Four.

Q. And approximately what distance do you have to transport that to get clear of the tracks on the east side?

A. I haven't the measurement on that; it would be about 40 or 50 ft. If they would put this freight off directly at the crossing, but many times they unload this freight 100 ft. I will say west and possibly sometimes throw it off 150 ft. up the line, just wherever the cars come in there and lay it off all along there.

Q. In other words, when they put the freight off there they have no particular place to put it off?

[fol. 67] A. No, sir, something 200 or 300 ft. along there.

Q. Well, now, take on the average, what distance is it necessary to move this freight from the place where you find it until you get free of the tracks on the hillside?

A. 100 ft.

Q. Then, you move it about 100 ft.?

A. Yes sir.

Q. Then, when you get beyond the tracks towards the hill you get beyond the right of way and can go ahead?

A. Yes sir.

Q. How have you gotten the freight from the tracks to your store during the ten years you have been there?

A. Been hauling it in wagons and carrying it; carry it across the tracks and reload it, etc.

Q. How about the heavy stuff?

A. Wagon it over and have carried some of it over, but you understand it is very hard for a man to get out and hunt up men to carry a bunch of stuff across there.

Q. Is there any shed or station house or other provision to protect the freight there unloaded from the rain or snow or weather?

A. There is not.

Q. Where do they put it when unloaded?

A. On the ground.

Q. What has been the result of that to your goods in the past?  
[fol. 68] A. Been a lot of it damaged.

Q. In what respect?

A. In respect to rain and snow and laying on the damp ground.

Q. Can you give the Commission some idea of the amount of damages, in dollars and cents, you have sustained from year to year?

A. Well, no, I never kept tab on that. The railroad company I believe will say I have never been very contentious.

Q. Have you actually sustained considerable money loss?

A. I have, yes, sir.

Q. Can you give an idea about what it would amount to?

A. No, I can't in that period of time, but I have been damaged there at times as high as \$30 or \$40 possibly.

Q. Was that a time when you could wagon across or not?

A. Yes, sir.

Q. How is it now when you have freight unloaded?

A. Of course it is this way, if that track was filled up there I could have taken care of it easier than the way it was.

Q. Has the track ever been graded up as a grade crossing?

A. At one time when a man owned that farm up there he had a grade crossing.

Q. How about the time the Pike Collieries was building the bridge there, did they have a grade crossing?

A. Yes, sir, they had a grade crossing.

Q. Was that crossing generally used by people who had occasion to get from one side of the track to the other with vehicles?

[fol. 69] A. Yes, sir.

Q. You say you can't now haul across these tracks?

A. No, sir.

Q. How long has it been since you could?

A. I don't remember; those posts were put in something like a month ago.

Q. Who put them in there, what are they?

A. The section foreman.

Q. Mr. Maynard?

A. No, sir, the section foreman.

Q. You heard the description of these timbers as given by Mr. Hicks this morning. Did he have that about right?

A. Yes sir.

Q. About how high do these stand, John?

A. Oh, 4 or 5 ft.

Q. Were you told while they were being put in why they were being put in?

A. Yes sir.

Q. Who told you?

A. Mr. Ward.

Q. The section foreman?

A. Yes sir.

Q. What did he say the reason was?

A. To keep wagons from crossing there.

Q. How long has that crossing been used by vehicles, within your knowledge?

A. Well, sir, the old man Bill McCoy used it for the purpose of farming and hauling other stuff from his farm back and forward [fol. 70] at the time the railroad was built and used it as long as he owned it, then he sold out to the Blackberry company and that crossing was taken out he had in there, and about the space of three or four years before the Pike Collieries Company come there and started up to erect a coal plant over there, and when they started up over there they built that bridge; then this here town or map of this town about that time was laid out and the Pike Collieries Company gets out across there and fills in and goes across and starts this here east road, shown on the map as Bridge street,—started to grade that road and also used the stone at the same time to erect that tippie there.

Q. Now, you have said prior to the time or I will ask you how long has the railroad been built?

A. I don't know just exactly the time.

Q. About how long?

A. Between 35 and 40 years.

Q. Prior to the time this coal company started up the crossing was there and McCoy used it?

A. Yes sir.

Q. With vehicles?

A. Yes sir.

Q. Then you said he sold out before the coal company come?

A. Yes sir.

Q. And for an interval the crossing was not used?

A. Yes sir.

[fol. 71] Q. Then when the Pike Collieries Company was building in 1905, from that time on the crossing has been used by vehicles?

A. Yes, sir, by companies and everybody that wanted to use it.

Q. Including the past ten years yourself?

A. Yes, sir.

Q. Can you give the Commission some idea of the number of vehicles, on the average, which used this crossing for getting from one side to the other of the tracks daily during that period of which you speak?

Mr. Cocke: Objected to. I would like for it to be in the record that I object to all questions as to the crossing at this point, and motion is made that this evidence be stricken out, on the ground it tends to establish whether or not there is a public road at this point and whether or not this is a public crossing, which is outside the issue before the Court.

The Witness: Well, as to myself I used it every day I would go over there, more or less every day, until the posts were put in, and sometimes I would go over there to haul stuff may be 15 times a day, other times maybe once or twice a day; and as to other teams passing over it, why the Allburn Coal Company teams go over it sometimes two or three times a day and other times not at all; and the other people from Blackberry, those merchants up there, when the river [fol. 72] is up, they use it frequently. I have seen as high as three wagons following each other across there, and at other times, when the river is down so they can ford it, they go the other way to Matewan.

Q. You spoke of merchants and people from Blackberry; you mean on the Pike County side?

A. Yes sir.

Q. How do you get from Pike County into Mingo County?

A. No way possible in time of high water except across this bridge.

Q. Now, with the tracks closed, no crossing, is that possible for them to cross the bridge and then cross the tracks with a wagon now?

A. No, sir.

Q. Why?

A. Because the timber is erected to stop that.

Q. Do other people get freight here except you?

A. Yes, sir, the Allburn Coal Company.

Q. Anybody else?

A. George E. Hart gets freight there; he handles feed for the coal company and has for a year or so.

Q. How about the Blackberry City merchants, do they get their freight there or at Matewan?

A. They get theirs at Matewan.

Q. Has there in the past, Mr. Followay, been any objection raised by the railway company to your using this crossing here?

A. Yes, sir, something like a year, maybe longer, I don't remember [fol. 73] the time, they put in some posts at that time.

Q. Prior to that had there been any objections for a period of years?

A. No, sir.

Q. Has there ever been any accident happened at this crossing?

A. No sir.

Q. No one using it has even been injured?

A. No sir.

Q. No property has been injured?

A. No sir.

Q. Yet it has been used for 15 or 20 years?

A. Yes sir.

Q. Something has been said, either in the petition or by some of the officers of the railway company, about your getting freight from Matewan. Tell us what expense would be involved if you were compelled to haul your freight from Matewan station instead of getting it at McCarr siding?

A. Well, I don't know whether one team would do the work or not but we will figure one team, and that would add to my expense \$8.00 a day.

Q. That would mean about how much per month?

A. Well, that would mean about \$200.00, because I would have to hire a man and a team and load the wagon and the way the roads are 1500 lbs. is all you can haul from Matewan to my place, and if you handle 20 tons of feed and flour it would take something like [fol. 74] five or six days to get a car unloaded.

Q. What else would occur if it required that time to unload a car?

A. Well, storage I guess or demurrage.

Q. About what distance is it from Matewan station to your store by county road?

A. Well, it's something near a mile and a half; near a mile by rail and the county road is considerable farther.

Q. Mr. Followay, is there any reason you can see why the freight unloaded at McCarr siding by the railroad company or its employees should not be unloaded on the side next to your store?

A. Well, of course they would have to carry it over that siding and over the westbound track to do that.

Q. Have you ever known a freight station to be on both sides of the tracks?

A. Yes sir.

Q. Then the difference would be the railway company would itself take this freight across the tracks instead of requiring the shipper or the consignee to do it, is that right?

A. Yes, sir.

Q. In there ground owned by the railway company at this crossing available and suitable for a station or station house for the protection of freight against the weather?

A. Well, there is plenty of ground on the east side.

Q. How about the other side?

[fol. 75] A. Well, the other side, to my knowledge, I have never seen the stakes put in and I don't know where the line runs, but from the knowledge I have of the right of way, from where the telegraph poles are set up, they would have room to erect a shed there to protect freight from rain, etc.

Q. Would the construction of a station or freight house at McCarr siding on the side of the right of way next to the hill involve any unusual expense?

A. Only the material and time of building.

Q. What would it cost to erect a suitable freight house of a

capacity sufficient to carry the freight unloaded or shipped to or from this place?

A. I wouldn't be able to make a statement on that.

Q. Can you give us an idea of the size house required?

A. Well, at times there is a lot of freight there; it would require a pretty good sized house.

Q. As large as this room?

A. Yes, sir, larger than this room, I expect, at times; I mean including everything.

Q. Approximately how often do you get freight in carloads at this place?

A. Well, I got two cars in the month of December.

Q. Did you get some in January in carloads?

A. Well, it is on the road; I have the bill now.

Q. None has reached you since the first of the year?

A. No sir.

Q. What sort of freight is that?

A. One car of it is feed and flour and meal and the other car is [fol. 76] hay.

Q. From where is it being shipped?

A. The feed and flour from Wheelersburg and the hay, I don't know just what point that is coming from.

Q. West of McCarr siding?

A. Yes sir.

Q. Where will it be unloaded?

A. At McCarr siding on the west side.

Q. How will you get that across the tracks?

A. Carry it. Only one remedy and that is to hire men and carry it.

Q. What will that cost you?

A. I don't know just what it will cost; pretty high, carrying hay is ten cents a bale.

Q. Approximately what is the cost to you of having freight carried across these tracks above what it would be if hauled across?

A. Well, they would be something like \$15 or \$20 difference.

Q. Can you give us an idea of how many carloads you get annually here?

A. No, I can't; you see the times are not very good and haven't been for sometime.

Q. Take it over a period of five years?

A. I don't know just how many cars I have got. You see I buy a great deal of stuff in local shipments.

Q. Would it be 15 or 20?

A. Well, I don't know; in the last year I haven't got that many.

Q. How about 1920?

[fol. 77] A. I don't remember, but you see lots of times I have a lot of stuff come in there locally.

Q. Now as to the streets shown on this map, are they available and so graded as they can be used by vehicles from the railroad to the county road?

A. Yes sir, one way to the left you can use the streets by wagons.

Q. How about the right hand way towards the east?

A. No, they are not finished up, partly graded.

Q. In the past have vehicles, any number of them, used the county road from Matewan or points east to come to McCarr and then cross this siding? Suppose a wagon coming from Matewan and it wants to cross the Thacker bridge, can they do that?

A. Yes sir, if it was not for these timbers.

Q. Then, there is a driveway from the county road to the bridge except for the timbers?

A. Yes sir.

Q. And has been for how long?

A. It has been used there ever since that bridge was built.

Q. Have you ever known of the owners of the bridge refusing vehicles the right to cross it?

A. Never, no sir.

Q. Do people who have vehicles use this bridge indiscriminately?

A. Yes sir.

Mr. Cooke: We renew our previous objection to these questions.

Mr. Bias:

Q. Something has been said, Mr. Followay, about a runway be-  
[fol. 78] ing constructed here whereby your freight could be taken  
across the tracks in a wheelbarrow or other man-propelled vehicles.  
What objection is there to that?

A. The objection to that is, how long do you suppose it would  
take a man to wheelbarrow a carload of feed for 100 ft. down the  
road? How long do you think it would take him to do that? At  
times you couldn't get it across there and I look at it that a man with  
a wheelbarrow would be in more danger than in a wagon.

Q. You think it would not lessen the danger as between a wheel-  
barrow and a man driving a team across there?

A. Yes sir.

Q. If you are required, as you now are, to transport your freight  
from one side of the tracks to the other by man power, what occurs  
to the freight in the way of being damaged by weather?

A. Well, if it is laid off there and it is raining it will soon ruin.

Q. Suppose this carload of feed and flour comes in there and is  
unloaded on the west side, approximately how long will it take two or  
three men to carry this across to the store?

A. Oh, it would take two or three men,—well, I don't know how  
long it would take. The question is that it is such a hard matter  
to get men to carry feed like that.

Q. Suppose you had them ready, how long would it take?

A. Something like a day.

[fol. 79] Q. Suppose you get half a car unloaded on the ground  
it would take half as long to get that over?

A. Yes sir.

Q. And if it was raining what would happen?

A. I would lose it. And it's a question with a man whether he  
wants to carry that or not. It's hard to get men to fool with it.



Q. Mr. Followay, what effect is this action of the railway company going to have on your business provided the company does not furnish proper crossing facilities at this siding?

A. Well, I have to consider it this way: I will have to close out my business, because I can't compete with the people at Matewan and get my freight at any other point, and I can't keep an army there to carry it over the tracks, and in order to compete I have to get my freight where I can get to it with wagons and at no more expense than they are.

Q. In other words, it would subtract 5 per cent from the profits if you have to haul it from Matewan instead of where you get it?

A. Yes sir.

Q. This you would lose or charge to your customers?

A. Yes sir.

Q. I believe you estimated your cost of hauling this freight from Matewan at \$200.00 a month?

A. Every bit of it.

Q. Is there anything more you want to volunteer for the Com- [fol. 80] mission before I turn you over for Cross examination?

A. I don't know of anything.

#### Cross-examination.

By Mr. Cocke:

Mr. Cocke: Not waiving any of the rights which have been reserved, and not waiving the motion to strike out that evidence that goes to establish a public road and public crossing, counsel for the railroad company proceeds with the cross-examination.

Q. Mr. Followay, it would be a great convenience for you if the railroad company ran its lines right by your door, wouldn't it, so they could set your freight off on your front porch?

A. Well, that is not consistent. I don't expect anything like that.

Q. Mr. Followay, wherein do you differ from other country merchants? You are well acquainted with the business done by other country merchants; these other country merchants have no railroad at their door. Wherein do you differ from them, and why should you have a delivery at your front door or within 200 yards thereof, when the other country merchants have to haul their freight from a regular freight depot?

A. I consider that is their bad luck.

Q. And it's your god luck that the railroad maintains this service, isn't it?

A. Sure, it's an advantage to me that there should be a station at this point.

Q. It means a big item to you that they put off your freight at this point within 200 ft. of your front door?

A. It does, if a way is provided to get to it.

[fol. 81] Q. How do those merchants who get their goods from Matewan get them?

A. Haul them. Some of the merchants from Matewan come up there and sell goods in my neighborhood.

Q. And you sell some in Matewan?

A. Yes sir.

Q. And haul the stuff to Matewan?

A. Yes sir.

Q. Do you find that a profitable business, to sell in Matewan?

A. Sure it is or I wouldn't sell over there, but if I had to haul the goods from Matewan to my place and then back it would make it worse.

Q. It never occurred to you that all your goods you wanted to sell at Matewan to have them put off at Matewan, did it?

A. No sir, I couldn't do anything like that.

Q. Where is the bulk of your trade?

A. Well, the bulk of my trade is at Lynn, a mile above me.

Q. On the West Virginia side?

A. Yes sir, that is part of it, but the main bulk is the Alma-Thacker or at that point and that is the big bulk and some at All-burn Coal Company.

Q. You are taking into consideration your trade at Matewan and at Lynn and the bulk of the trade is across the Kentucky side in the Alma-Thacker district?

A. Yes sir, a good deal of it.

[fol. 82] Q. Could you state about the percentage of your business maintained up there, 75 per cent or greater?

A. No, sir; I have some trade all around there.

Q. You can estimate it, can't you?

A. Well, I wouldn't have any idea, but I know there is more business at Alma-Thacker.

Q. Your business is mostly on the Kentucky side?

A. There is as much or more on the Kentucky side than on the West Virginia side.

Q. How do you make deliveries on the Kentucky side?

A. Cross the railroad at this same point.

Q. You haul the stuff across the railroad tracks from your store to make the deliveries over into Kentucky?

A. Yes sir.

Q. It would benefit you a great deal to have a grade crossing at this point, would it not?

A. Yes sir.

Q. Isn't that the purpose of your complaint to this Commission?

A. No sir.

Q. What is your purpose?

A. The main purpose is to get my stuff from the place where they lay it off to my store.

Q. To get it to your store you can drive a wagon to the north side of the railroad line?

A. Yes sir.

Q. You can haul it the distance of those four tracks from the point where it is unloaded to the wagon and haul it to your store, [fol. 83] can't you?

A. You can't haul it from the place where delivered across the tracks but you can carry it, if you are able to keep eight or ten men.

Q. If the railroad company had a station at this point how would you handle it?

A. It would be bad to handle it then.

Q. So you would like for the railroad company to furnish men to unload and take it up to your store?

A. No, sir, all I ask is to give me a way to get across there with a wagon.

Q. Are you complaining to this Commission about the fact you have to hire men to carry your stuff across there?

(Objected to.)

A. I am complaining that the railroad company brings my stuff there and it lays on the ground that I have no way to get a wagon over there to get the goods and I can't get my goods over to the store.

Q. You don't complain of the fact you have to have men to load your wagon?

A. I have a man hired to drive my wagon and I have men to carry stuff over there and to unload the wagon.

Q. Suppose the railway company put in a station house, do you think you would get away from hiring men or someone to load your wagon?

A. If I had a crossing over there I could get my goods.

Q. Where do you want that station?

[fol. 84] A. I am wanting a place to get across there; put it at any place, just so I can get across there. I have no objection so I have a way to get my wagon across the tracks to get to it.

Q. Are you acquainted pretty generally with the line of railroad through West Virginia of the Norfolk & Western, and acquainted with the service the railroad offers the public, are you?

A. Well, not so much.

Q. You are acquainted with how it serves your competitors, aren't you?

A. Yes sir, my competitors live at Matewan and have their stores there. I think the railroad company put a couple of crossings in up there for the town of Matewan.

Q. The railroad company has made a good many crossings up there, up and down its line?

A. Yes sir.

Q. You don't know how a crossing is put in?

A. No, sir, I am not an engineer.

Q. Do you know under what public authority they are put in?

A. No sir.

Q. You are aware the railroad company gives service along its line at points where there are no stations, where neither a station or agent is maintained?

A. They do that, yes sir.

Q. They have sidings along where they put off stuff, and you [fol. 85] know they make deliveries of less than carload freight at

points where no agent is maintained or no station house, you know that to be a fact, don't you?

A. Sure, yes sir.

Q. Can you give any good reason why you should be preferred above these other points,—why you should have a station or a station and agent and these others should not?

A. Well, I have never been able to figure my own business let alone other peoples business. I think that is the only place I know of, was ever acquainted with, that they have a station stop and lay a man's goods off on one side of the *of the* railroad and no way possible to get a wagon to the point to haul them away.

Q. Would you say the business that you give the railroad company at this point is greater than the points at which it maintains a similar service for other receivers of freight?

A. I don't know what other people are doing.

Q. You wouldn't say that you was extraordinary or that you deserved any particular consideration, if your business isn't shown to far exceed theirs?

A. No sir.

Q. Is there anything peculiar to your business and your store and the amount of business you do to justify a station and all of these [fol. 86] facilities you are asking as compared to someone else along the line?

A. Well, the point I am interested in is a crossing. That is the point I am interested in and the point I am fighting for, the matter of getting my wagon over that track to the station.

Q. You are not interested in establishing a public road there in order to cross the Tug River bridge and pass over and up into the Kentucky mountains?

A. Yes sir, I am interested in that too. It is a help to my business to go over there, but the main point to me is to get to this station where freight is unloaded with my wagon, so I can take care of it.

Q. You confess your wagon can drive up on the north side and receive the goods?

A. Yes sir.

Q. And you can load that from there?

A. Yes sir, by carrying it across there. I have been fortunate enough, under the existing depression, and men being out of labor, in the past that I have been able to get men to carry goods for me.

Q. Now, Mr. Followay, you say you have lived for ten years at McCarr siding?

A. Yes, sir, near ten years.

Q. Now, you have testified at various points in the record to happenings of 15 years ago. Were you in this neighborhood then?

[fol. 87] A. Born and raised right across the river from there.

Q. So you are acquainted with it during your whole career?

A. Yes, sir.

Q. Now, what is the population of this town?

A. Well, I don't know, something like 25 or 40 houses there.

Q. Who are those people, what is the character of them, miners or farmers?

A. Well, not many farmers; some miners; one more merchant back there.

Q. He buys from Matewan?

A. Yes sir.

Q. How does he get delivery?

A. He hauls his goods from Matewan, but he is about half the distance between my place and Matewan.

Q. Is he a competitor of yours?

A. Yes sir.

Q. And hauls from Matewan?

A. Yes sir, but only about half the distance I would have to.

Q. He has to haul his goods a half a mile before he gets to his store?

A. Yes sir.

Q. You have to haul yours how far?

A. Two or three hundred feet.

Q. Puts you in pretty good position to compete with him, doesn't it?

A. Yes sir.

Q. These people who live there buy from you and this other store. [fol. 88] I presume?

A. Sure.

Q. Do those people have any dealings with the railroad company in the town?

A. Not that I know of.

Q. Do they receive freight?

A. Nothing to speak of.

Q. It isn't these people you represent here coming in and competing with you?

A. No sir, the people joining in here are on Blackberry Creek, who want to get to Matewan.

Q. But these people on the West Virginia side are joining with you in this complaint?

A. The people at Blackberry City, yes sir, and the merchants at Matewan are joining in.

Q. Are they represented here and going to appear here?

A. Well, they are supposed to be; they complain they are cut off from the business at Allburn and Alma-Thacker and other points in Kentucky.

Q. They don't want a station house here?

A. No sir.

Q. Nor do they want a crossing for the purpose of picking up their goods?

A. No sir.

Q. What they want is a public road?

A. Yes sir.

Q. What did this Bill McCoy do who owned the property prior [fol. 89] to the land company?

A. He was a farmer.

Q. For what purpose did he use the crossing?

A. For hauling coal, corn, anything he might need; his farm was on one side of the railroad and his residence on the other. The Norfolk & Western Railway run through his farm.

Q. Is there any farming on the other side between the railroad and the river?

A. No sir, but his residence was there.

Q. What did he want to cross for?

A. To get to his farm.

Q. Where was his farm?

A. Just across on the other side where Blackberry City is now.

Q. Does Geo. D. Hart get freight at that point?

A. Yes sir.

Q. Where does he live now?

A. On the Kentucky side of the river, something like a half a mile east or a mile.

Q. Does he receive freight there now?

A. Well, he gets a little bit of express but practically nothing now.

Q. Is he complaining with you?

A. Yes sir.

Q. Is he going to testify?

A. I suppose he will.

[fol. 90] Q. You say you are the special agent of the Blackberry-Kentucky & West Virginia Land Company?

A. Yes sir, they have an agent for that place but I am kind of a local agent; anything I do is all right; I have sold lots and send in and they send a deed.

Q. How many lots have you sold and how many lots have been sold in Blackberry City?

A. I don't know, maybe 100.

Q. Have they been built on after the purchase?

A. Part of them have and part have not, 30 or 40.

Q. Those individuals bought from the land company?

A. Yes sir.

Q. Did any of them own their property before this land company plotted the town?

A. No sir.

Q. They all bought there since?

A. Yes sir.

Q. Do you know how those lots are described when they purchase them, do they describe them as city lots or describe them by metes and bounds?

A. Described as city lots.

Q. Just give the number of the lot and city block?

A. Yes, sir.

Q. Mr. Followay, are you acquainted with the stations at Rose and Sprigg, W. Va.?

A. No, sir; I am acquainted with the one at Rose, not at Sprigg.

[fol. 91] Q. Are you aware of the fact at Rose there is a similar situation to the one at McCarr, in that freight is put off on the north

side of the tracks to be taken by consignees, who move that property to the south side?

A. Well, at Rose there is nobody there get freight I know of but the coal company and they live on the south side of the railroad.

Q. The coal company is located on the south side?

A. Yes sir.

Q. And deliveries made to them on the north side from the west-bound track?

A. Yes sir.

Q. Are you advised whether or not there is a crossing at that point for the purpose?

A. No sir, I haven't been there for sometime; I don't know about the crossing at all.

Q. If such a fact is established you wouldn't be in a position to deny it, would you?

A. No sir.

Q. You don't know whether there is a crossing maintained by the railroad company for the benefit of that consignee or not?

A. No sir.

Q. Now, at Sprigg, are you aware of that situation?

A. I don't know anything about that.

Q. And if it develops that freight is delivered on the right of way at that point on the south side you are not in position to confirm or deny that freight is put off on the south side and consignees [fol. 92] must carry that freight to the north side and accomplish that without the benefit of a crossing?

A. I don't know about that.

Mr. Bias:

Q. John, with the freight which is unloaded for you at McCarr siding from trains going east, is there any way by which with a vehicle you can haul that freight to your store?

A. None at all at the present time.

Q. In other words, you can neither go east or west of the tracks?

A. No sir.

Q. Do you know whether that is true at Rose siding and Sprigg?

A. I don't know.

Q. Then, when freight is unloaded as it now is, and with timbers in there as now, you are forced to carry it across the tracks?

A. Yes sir.

Mr. Cocke:

Q. You say you don't know of any crossing east or west?

A. I mean that I can get to — from the station — the car with my wagon, no way up and down the railroad track.

Q. There is a crossing west of this?

A. Yes sir, but I can't get to it by staying on the West Virginia side.

[fol. 93] Q. There is a crossing west of you, is there not?

A. Yes sir.

Commissioner Wiles:

Q. How far would your wagon have to travel to use this crossing west of the crossing in question?

A. Have to go something like, well, something like half a mile.

Q. In which direction?

A. Back and strike the Mingo County road, and by the time you would get to the ford be something — mile and a half, and then something like quarter of a mile back up to the Allburn Coal Company bridge, and possibly there will be a week you can't ford that river, and other times ten or fifteen days you can't get over there at all.

Q. The distance is about the same as to Matewan?

A. Yes sir.

Q. What facilities are afforded passengers alighting at this point for crossing the track, any walkway or anything?

A. No sir, just the track.

Q. Do passengers alight and cross the track at that point?

A. Yes sir, and have to cross the tracks to board the train.

Q. Do the people of Blackberry City patronize that section or Matewan?

A. They patronize that, all the trains that stop there.

[fol. 94] Mr. Bias:

Q. The people in Blackberry City get mail at McCarr siding, which is on the Kentucky side of the river?

A. Yes sir.

Q. Can you give the Commission an approximate idea of the number of people that get off and on the train at McCarr siding a day?

A. Well, sometimes five, sometimes ten, sometimes fifteen, and I have seen as high as 25 and 30.

Q. About what is the average a day?

A. Well, it will average I would think 20 or more.

Mr. Cocke:

Q. Going for the mail doesn't involve any vehicle, does it?

A. No, sir.

The witness is excused.

[fol. 95] Thereupon came J. E. DOTSON, a witness of lawful age, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bias:

Q. Where do you live, Mr. Dotson?

A. In Pike County, Ky. on Blackberry Creek.

Q. How far from the mouth of Blackberry Creek?

A. Well, it's seven miles, I guess.



Q. In what business are you engaged?

A. In the merchandise business.

Q. About seven miles from the river?

A. Yes sir.

Q. How long have you been engaged in the mercantile business there?

A. About nine years, I think.

Q. How many other merchants are there in the mercantile retail trade on Blackberry Creek?

A. Eight now.

Q. Including you?

A. Yes sir.

Q. How many of those merchants are here united in this request?

A. Seven, I think.

Q. Where do you get your goods which you sell in your store?

A. At Matewan.

[fol. 96] Q. Do the other merchants on your creek do the like?

A. Yes sir.

Q. Is Matewan the nearest station to get your merchandise?

A. Yes sir.

Q. If there were a station at McCarr siding it would be nearer to you?

A. Yes sir.

Q. How do you get from your place of business to the station at Matewan?

A. Why, we get there in wagon when we haul; come down Blackberry Creek to the river and ford it when the river is so we can ford it.

Q. Suppose Tug River is not fordable, how do you get from your store to the station and from the station to your store?

A. Well, we cross the Allburn bridge sometimes, sometimes go across the private bridge of Buskirk.

Q. What portion of the year do you find it impracticable or impossible to ford Tug River to get to Matewan station?

A. In the winter time mostly.

Q. Estimate the number of weeks out of the year you can't ford the river?

A. I judge one-third of the year.

Q. For what length of time at intervals is the river not fordable?

A. Well, I have knowed at times two or three weeks.

Q. Is it frequent a week or two weeks you can't ford Tug River [fol. 97] in the winter?

A. Yes sir.

Q. If you are unable to ford Tug River, what facilities do you have for getting to and from this station where you ship your freight?

A. Well, the only remedy is, to cross the bridge at Allburn.

Q. Have you been crossing there the last eight or nine years with wagons?

A. Yes sir, off and on.

Q. And is what you say also true of the other merchants on Blackberry Creek, the other seven here?

A. Yes, sir.

Q. They do what you do?

A. Yes sir.

Q. Can you give the Commission some idea of the volume of freight hauled from Matewan station to the merchants on Blackberry Creek?

A. Well, my average is about two wagon loads a week.

Q. From the station to your store?

A. Yes sir.

Q. What would be the average of the other seven or eight merchants, if you know?

A. I judge not much difference.

Q. Then, you think the whole of you would have 14 or 16 wagon loads a week?

A. Yes sir.

Q. And for a third of the time you are unable to ford the [fol. 98] river?

A. Yes sir.

Q. Is that a serious inconvenience to you people, that inability to get to and from the station?

A. Yes sir, I would think it was.

Mr. Cocke: Objected to. I make a general objection and motion that any evidence given here tending to the establishment at McCarr siding of a different station than what it is or at present exists, be stricken out, as that is not a part of this complaint.

Mr. Bias:

Q. You have said that you figure that there is 14 to 16 wagon loads of freight per week move from the station?

A. I think the average would be something like that.

Q. What is the remedy for your inability to get from the station to which your goods are shipped to your place of business?

A. Well, to cross at the Allburn bridge is all I know of at this time.

Mr. Cocke: I move that any evidence tending to establish a public highway before this Commission shall be stricken from the record. This is not a proceeding to establish a public road, and I renew my statement a few moments ago, which counsel said he could not understand, to the effect that I move that any evidence be stricken [fol. 99] out that goes to change the character of this stop. There is no complaint before this Commission as to the character of the stop maintained there by this railroad company.

Mr. Bias:

Q. You have said, Mr. Dotson, the only remedy is crossing the bridge at McCarr. How is it possible for shippers who have freight

consigned to them over the Norfolk & Western to cross the river at McCarr, before you can cross the bridge what do you have to do?

A. If there is no crossing, you mean?

Q. What is necessary before you get to the bridge?

A. It is necessary for a crossing to be there.

Q. A grade crossing over the tracks?

A. Yes sir.

Q. Is that there?

A. No sir.

Q. Has there recently been something done to prevent wagons from crossing these tracks—are there timbers there that make it impossible to cross?

A. Yes sir.

Mr. Cocke: We renew our objection to this line of examination.

Mr. Bias:

Q. If you are not able to cross the bridge at McCarr in order to get to the station, what is the next method of getting across Tag from the N. & W. to your store?

[fol. 100] A. This would be the nearest bridge here at Williamson. I judge.

Q. And east of McCarr what is the bridge?

A. I don't know where there is one.

Q. Possibly farther than this one?

A. Yes sir.

Q. Then, if you are not able to cross the bridge at McCarr with your wagon when the river is not fordable you can't get your freight hauled by the Norfolk & Western for you at a point closer than Williamson?

A. I don't know of any point.

Q. Suppose you come to the Williamson station when the water is up, can you haul from Williamson to Blackberry Creek?

A. Well, a man could but the way the mountains is it would be a job.

Q. Mr. Dotson, how important to you and the other shippers on the Norfolk & Western who reside in Pike County, on Blackberry Creek, is it to have a grade crossing at McCarr siding?

A. Well, it would be a great advantage to us, if we had.

Q. How important would a station house for storing freight be to you?

A. It would be very important for us.

Q. Save you the additional mileage to Matewan?

A. Yes sir.

[fol. 101] Q. Have you any idea of the freight, in dollars and cents, or the volume of business done by you and other merchants at Blackberry Creek, who receive freight from the Norfolk & Western?

A. Well, I couldn't hardly figure the amount.

Q. You reach McCarr siding in coming from your store to the station at Matewan?

A. Yes sir.

Q. Do you know the store of John Followay at McCarr siding?

A. Yes sir.

Q. Have you an idea of about the volume of business you do, how it compares with the volume of business done by Followay at McCarr siding?

A. Well, I judge he does half a dozen times the amount of business I do.

Q. Can you give the Commission some idea of the volume of business you do annually, in dollars and cents?

A. Well, I sell something like \$8,000 or \$10,000 a year.

Q. Do you know whether you are about the average with the other merchants on your creek?

A. Well, I judge about an average.

Q. And all of these merchants have to receive their freight from the Norfolk & Western, don't they?

A. Yes sir.

Q. Is that the best and nearest point for their use now where there is storage facilities?

[fol. 102] A. Yes sir.

Q. How far do the other merchants reside from Matewan on your creek?

A. Well, they run from, some of them, about two miles and some three and four, along that way.

Q. Are you the one highest up the creek?

A. Yes sir.

Q. Mr. Dotson, the bridge which spans the river at McCarr siding, which we understand is owned by the coal company. Has there ever been a time you know of there has been any objection to vehicles crossing this bridge?

A. There was one time when the bottom of the bridge got rotten and unsafe.

Q. Have you ever known of a time when the owners objected to people generally crossing the bridge with vehicles?

A. No sir, not when the bridge was safe.

Q. Then, for all purposes it is as open as if a publicly owned bridge?

A. Yes sir.

Q. And in order to make this bridge available for any use for those who cross to and fro from Kentucky to West Virginia, is a grade crossing over the Norfolk & Western tracks necessary?

A. Yes sir.

(Objection previously made is renewed.)

Q. Who else on Blackberry Creek is a considerable shipper of [fol. 103] freight, other than you merchants?

A. Well, Jeff Davis is one.

Q. I mean other than the merchants you spoke of?

A. Yes sir, a few has shipping done.

Q. What is the population of Blackberry Creek?

A. Well, I can't tell just exactly what. There is something like 600 or 800 I judge.

Q. All these people who have occasion to use the railroad for freight or passenger service use the Norfolk & Western?

A. Yes sir.

Q. And either come to McCarr siding or Matewan, as a rule?

A. Yes sir.

Q. Mr. Dotson, have you any well defined idea of the saving in value to the shippers, including the merchants mentioned, there would be if you had proper facilities for crossing the track at McCarr siding, in the course of a year?

A. Well, I don't know just what it would be.

Q. It would be big, would it not, in money?

A. Yes sir.

Q. How much advantage, if you had storage facilities there or a freight room, without an agent, would that be worth much to you?

A. Yes sir, be worth considerable.

Q. And what is true in your case is true of all these merchants I believe you say?

[fol. 104] A. Yes sir, I think so.

Cross-examination.

By Mr. Cocke:

Q. Do you think that storage house would be much saving to the railroad company?

A. Well, I can't tell what it would be for the railroad company.

Q. Do you know who owns that bridge,—you know whether the county owns it?

Mr. Bias: It is admitted in the record that it is owned by the coal company.

Q. Is it also admitted they maintain it?

Mr. Bias: So far as we know, yes sir. I will admit that to be true, so far as counsel knows it.

Mr. Cocke:

Q. You receive your freight at Matewan, do you not?

A. Yes sir.

Q. Do you pass McCarr in coming to Matewan?

A. Yes sir.

Q. When you state a third of the year it is closed and you can't cross, you mean continuously closed a third of the year?

A. Lots of times in the summer season, sometimes a few days we can't cross; then in the winter and spring generally it is up a bigger portion of the time past fording with a wagon.

Q. But you could get through very often during any part of [fol. 105] the season?

A. Yes, sir, occasionally we can do that.

Q. It depends entirely on the rain fall?

A. Yes sir.

Q. Have you ever attempted to cross the Allburn bridge and found cars blocking the way on the West Virginia side?

A. I think one time when we went across there.

Q. What happened?

A. I don't know; they had been shifting up there some way; later they moved them out.

Q. You backed up and waited for them to be moved?

A. Yes sir.

Q. Have you observed that crossing often,—you have passed there many times?

A. Yes sir.

Q. What is the usual state of those sidings that serve the Allburn Coal Company as to cars standing on them, what is the general situation?

A. Well, the cars ordinarily, if any cars in the way of the crossing—not many times that I have been there that there was any in the way.

Q. So there is a very light business and they don't crowd those two sidings?

A. Well, not often.

Q. Don't crowd them either with loaded or unloaded cars?

A. The loaded cars go back up on the end of the bridge.

Q. So it is exceptional cases when cars on those two sidings interfere with traffic over the bridge?

A. Yes sir.

Q. You can state it is very exceptional you find that traffic is interfered with there?

A. Yes sir.

Mr. Bias:

Q. All crossings, grade crossings, are blocked at times, aren't they?

A. Yes sir.

Q. And a crossing, a proper facility, would not only be across the main tracks but the side tracks?

A. Yes sir.

Q. You have said when you can ford you do ford the river. Will you tell the Commission the character of this ford, as to being useable and safe and convenient?

A. Well, it has got to be of late worse than it used to be; the sand comes in there and it is dangerous until the water gets down low.

Q. Quick sand?

A. Yes sir.

The witness is excused.

Complainant rests.

[fol. 107] *Evidence Introduced on Behalf of the Norfolk & Western Railway Company*

Thereupon came F. A. LINDSEY, a witness of lawful age, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cocke:

- Q. Where do you reside?  
 A. McCarr, Ky.  
 Q. Mr. Lindsey, what is your employment at the present?  
 A. I am with the Allburn Coal Company, manager of the Allburn Coal Company.  
 Q. At what point?  
 A. McCarr, Ky.  
 Q. How long have you been in that capacity?  
 A. About four years.  
 Q. Mr. Lindsey, will you state who owns and maintains the bridge across the Tug River?  
 A. The bridge is owned by the Blackberry & Kentucky Coal & Coke Company, and is leased to the Allburn Coal Corporation.  
 Q. Who maintains that bridge?  
 A. The Allburn Coal Corporation.  
 Q. Does either the county of Pike, Ky., of Mingo, W. Va. contribute [fol. 108] tribute to that?  
 A. They do not.  
 Q. Is that road considered a public road—is that considered by you and the owners as a public bridge?  
 A. It is not.  
 Q. Is that road that leads to the bridge considered a public road?  
 A. It is not.  
 Q. Who owns the land at the entrance to the bridge and the exit on either side of the river?  
 A. Well, the Blackberry and Kentucky Coal & Coke Company own it on the West Virginia side, and I believe that on the Kentucky side, on the Followway lease, is leased by the Blackberry-Kentucky Land Company.  
 Q. That is private property, so far as you know?  
 A. Yes, sir.  
 Q. That is on both sides of the river on private property leased by the Allburn Coal Company?  
 A. Yes sir.  
 Q. Do you know of any court proceeding or any proceeding of public authorities to establish a public road over this—
- Mr. Bias: It is admitted by counsel for Followway this is not a public road or a public bridge or publicly maintained.

[fol. 109] Mr. Cocke:

Q. Mr. Lindsey, do you or does your company consider this a public road leading over the bridge, or does it consider that that bridge is a public bridge?

A. Do not.

Q. Are you willing that this Commission shall make any order establishing that as a bridge or enter any order that will make of this bridge a public bridge or a public highway?

A. No sir, we are not.

Q. Mr. Lindsey, it is in the evidence that your sidings are seldom crowded, that it is the exception and not the rule that whatever pathway or roadway is there is seldom blocked by cars. What do you say as to that?

A. Well, I don't agree with that. I think it is very often blocked. It is usually open during the day, a large part of the day, but at times for an hour or two hours it is blocked, and there are times for a full day it is blocked.

Commissioner Wiles:

Q. What siding is that, Mr. Lindsey?

A. It is the tipple tracks.

Q. Is that the track by the side of which this freight is unloaded?

A. No sir.

Mr. Cocke:

Q. Now, the passage way is cleared not for the purpose of passage, but for the purpose of loading cars?

[fol. 110] A. Yes sir, we want a way to get in there and to get out and we keep that open when we can.

Commissioner Wiles:

Q. Do you have any loss and damage to freight there?

A. No, sir.

Q. What sort of freight do you have at that point?

A. Our shipments last year were between \$60,000 and \$70,000.

Q. Your revenues paid for freight and express amounted to what?

A. We pay very little; it is usually paid by the shipper, a prepay station.

Mr. Cocke:

Q. You are not asking for this crossing, are you, Mr. Lindsey?

A. I am not asking for it, unless I have made a mistake in signing an application presented to me. If I understood it right, I was trying to help Mr. Followay out, and if by signing that I am asking for a public crossing I wish to withdraw my signature from the petition.

Q. The crossing of the four tracks of the railway company is not necessary to your receipt of freight?

A. No sir.



Q. It would serve no purpose to have that crossing put in, would it?

A. No, sir, not so far as we are concerned.

[fol. 111] Q. You get the bulk of your freight from the west?

A. Yes sir. We have quite a little heavy stuff we handle on both tracks, goes out on one and comes back on the other.

Q. If you have to haul them across the track or lift them across the track, you are satisfied with that arrangement?

A. Yes sir; we would like to have it smoothed up some, but we can handle it as it is.

#### Cross-examination.

By Mr. Bias:

Q. You have heard the testimony about the use of this bridge. You have been there for four years and have never attempted to prevent people crossing the bridge, have you?

A. Only when the tracks were blocked.

Q. You haven't blocked them for the purpose of preventing that?

A. No sir.

Q. Any crossing will become blocked, won't it?

A. Well, there is a little distinction there. These cars are placed on the siding to be loaded. If we were obliged to disturb those cars before they are loaded it would seriously interfere with our business; it would mean dropping the cars below the tipple and we couldn't get them back.

[fol. 112] Q. Who owns these said tracks and tipple tracks?

A. As to who the title is in I am not dead sure.

Q. Isn't it the Norfolk & Western?

A. They maintain the track. They keep the track up. My impression is the track belongs to the Blackberry & Kentucky Coal & Coke Company.

Mr. Franklin: They are in a way owned by the railway Company—maintained by the railway company for the exclusive use of the coal company, and they serve the same purpose as they would if they were their own tracks.

Mr. Bias:

Q. Mr. Lindsey, you were asked if you were making the same request here as to the facilities at this point. As a matter of fact you are one of the petitioners signing a petition asking the County Court for crossing facilities at this point?

A. I signed the petition.

Q. Would it be useful and convenient for you and your company to have proper grade crossing over these tracks, particularly in getting freight from the other side of the tracks than that on which your plant is located on?

A. Well, as I stated, it would be convenient to have a way to get that stuff across by wagon, but I don't know as the wagon would [fol. 113] amount to much so far as we are concerned.

Q. You have in the past been able to haul your freight across these tracks?

A. Well, possibly we have, but there is very little freight we have to cross there with a wagon for.

Q. Only when you have heavy stuff which is inconvenient to carry?

A. Yes sir.

Q. This grade crossing is also used and convenient for you and your people to get vehicles to Matewan, when the river is up, the same as the others?

A. Yes sir.

Q. There is no other way than crossing the bridge at that time when the river is up?

A. No sir.

Q. Who is your landlord, Mr. Lindsey?

A. The Blackberry-Kentucky & West Virginia Land Co.

Q. That is J. C. Miller, President, and Geo. S. Wallace connected with it?

A. Yes sir.

The witness is excused.

Thereupon the further hearing is adjourned and continued to the 8th day of February, 1922, to be resumed at Charleston, West Virginia.

[fol. 114] Charleston, West Virginia, February 8th, 1922.

The further hearing is resumed this the 8th day of February, A. D. 1922, pursuant to the foregoing adjournment.

Present: Same parties.

Thereupon came W. O. FRANKLIN, a witness of lawful age, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cocke:

Q. Mr. Franklin, what is your connection with the Norfolk & Western Railway Company?

A. Superintendent of the Pocahontas Division.

Q. Is the McCarr station on this division?

A. Yes sir.

Q. How long have you been on this division?

A. For nine years.

Q. Your whole business experience is railroad experience, is it not?

A. Practically so, yes sir.

Q. Won't you explain what is the character of the stop that is maintained by the railway company at McCarr, passenger and freight?

A. McCarr is a prepay point, prepay station, for freight, and is a flag stop for three passenger trains.

[fol. 115] Q. Those passenger trains are Nos. 2, 8 and 29, are they?

A. That is correct.

Q. Two eastbound and one westbound train?

A. Yes sir.

Q. Do you know what community is served at McCarr?

A. No, not exactly. There is a small population on the West Virginia side, and I would say that the majority of the people served at that point are on the Kentucky side—are in Kentucky I should say—live in Kentucky.

Q. Could you state how many persons compose the community of McCarr?

A. I can't with any degree of accuracy.

Q. Mr. Franklin, the stop that is made at McCarr is similar to other stops maintained throughout your division, is it not?

A. Yes sir, we have a large number of stations on the division similar to that of McCarr.

Q. And when you say "similar," you mean no station house and no agent?

A. Yes sir.

Q. Could you estimate the number of such stops on your division?

A. Why, we had an occasion to look it up sometime ago, and as near as I can remember it was 60 to 70 points of that character.

[fol. 116] Q. Where service similar to that at McCarr is maintained?

A. Yes sir.

Q. Now, do you know anything about the amount of traffic at that point, the amount of freight hauled into McCarr and whether or not there is any freight traffic originating at McCarr?

A. I am not in position to state or even approximate the amount of freight handled at that point, but the freight hauled into that point is principally for Mr. Followay and the Allburn Coal Company and there is very little freight shipped out of that point. The outbound shipments consist of empty crates, containers, various empty containers of various characters and the household goods of a mine moving out now and then.

Mr. Bias:

Q. And loaded coal?

A. I was confining the statement to other than the coal business.

Mr. Cocke:

Q. Well, elaborate that. Your answer was confined to L. C. L. freight?

A. Yes sir, L. C. L. freight, as well as carload freight other than coal.

Q. Now, will you explain the carload shipments from this point?

A. As well as I remember, and I think the records bear me out.

that when the Allburn Coal Company is running full they will load from 8 to 10 cars of coal a day.

[fol. 117] Q. Then, this is a shipping point for carload freight from the Allburn Coal Company?

A. Yes sir.

Q. Is this a point to which carload freight can be billed for other than the Allburn Coal Company?

A. Why, our tariffs and shipping instructions specify it's a carload billing point for the Allburn Coal Company only, but as a matter of fact there has been carloads billed and handled to that point for Mr. Followay.

Q. Now, Mr. Franklin, will you explain how L. C. L. freight is delivered at McCarr?

A. It's unloaded on the ground beside the tracks, prepaid, and put off at owner's risk.

Q. And you say there are 60 or 70 other points on your division where freight is handled in a similar way?

A. Yes, sir; those figures were approximated at this time, and I wouldn't say that was absolutely correct as far as number is concerned; some of which handle considerable more freight than McCarr and others that doesn't handle as much freight as McCarr.

Q. Who is the largest receiver of L. C. L. freight at this point?

A. I can't say definitely, but I have heard it stated that it would break about fifty-fifty between Mr. Followay and the Allburn Coal Company.

Q. The Allburn Coal Company is not complaining here of its facilities that you afford them at this point?

[fol. 118] A. No, we have received no complaint from the Allburn Coal Company with reference to the service rendered at that point.

Q. Now, Mr. Franklin, this complainant complains that he has no way of carrying his goods from one side of the tracks to the other, except by stepping down between the rails, that there is no crossing whatever level with the top of the rails. Does a similar condition exist at other points on your division?

A. Yes sir.

Q. Will you name one or two points and make some comparison as to the way freight is handled at those other points with the point here in question?

A. Sprigg, W. Va. is very similar to that of McCarr. There is three tracks, the two main tracks and a middle track being involved at both places. There is no special arrangements made for crossing at Sprigg or other similar points, but at some points the track is more open than it is at others. Up until a short time ago the track in that particular compared favorably with that of Sprigg, but we ballasted our track at that point a short time ago, and at which time the track was left more open than it was.

Mr. Bias:

Q. You mean the holes were bigger?

[fol. 119] A. That is, the depression between the tracks possibly was deeper, and the track not filled up between the rails possibly as well as before this ballasting took place.

Mr. Cocke:

Q. At Sprigg there is no filling, is there, to accomodate the receivers of freight on the one side and on the other,—I mean between tracks and between rails, is there any filling in between the rails to accomodate those who want to carry their freight from one side of the road to the other?

A. No, there is nothing.

Q. Can you name another point or any other points you have in mind where this condition exists similar to Sprigg?

A. Well, at Rose siding the freight is unloaded from westward trains for the Thacker Coal & Mining Company, put off on the north side and no special crossing provided for carrying this freight across.

Q. And a number of points on your division similar?

A. A large number of points I could enumerate, yes sir.

Q. Mr. Franklin, the application to this Commission is for a crossing for the benefit of Mr. Followay and others similarly situated. Suppose a crossing was put in as is requested, would you consider that a safe crossing?

A. No, I would consider it a very dangerous crossing.

[fol. 120] Q. Won't you describe why you consider it dangerous, considering the distances of the visibility and all the features pertaining to it?

A. The physical conditions are such that trains can't be seen approaching from either direction a very great distance and the noise from the Allburn Coal Company made by shaker screens when the mine is running is so great that the train cannot be heard approaching from either direction until it is almost onto this proposed crossing.

Q. What are the limits of visibility of that crossing from an engine approaching either from the west or the east?

A. Trains approaching from the east can be seen from the crossing a distance of 231 ft. Trains approaching from the west can be seen from the crossing a distance of 293 ft.

Q. Now, vice versa, Mr. Franklin?

A. The engineman looking from the train would have a similar visibility of the crossing, on westward bound trains the engineer could see the crossing for the entire distance of 231 ft. On eastward bound trains the fireman or from the fireman's side of the engine the crossing could be seen for a distance of 293 ft. but the engineer on an eastward bound train could not see this crossing until he was practically on same.

[fol. 121] Q. What are the difference- in duties between the engineman and fireman as to watching the track ahead?

A. Why, it's the duty of the engineer to keep a constant lookout, and the duty of the fireman is to assist in keeping a lookout, as far as practicable to do so and attend to his other duties.

Q. What are those other duties that prevent his keeping a constant lookout?

A. Looking after firing of the engine, keeping fire in the engine.

Q. Could you estimate how much of his time could be employed in looking ahead—what proportion of his time could be employed for that?

A. I am not in position to make anything like an accurate statement as to that. It would largely depend on the class of engine, the character of train, etc.

Q. Would you say the major part of his time would be needed in looking after his duties in firing?

A. I would say on what we term a hand fired engine, the major portion of his time would be consumed in keeping up steam, firing the engine. On stoker fired engine, the fireman would have considerable more time to keep a lookout ahead.

Q. Now, Mr. Franklin, on a westbound train, what is there to limit [fol. 122] the view of the engineman of the crossing proposed?

A. The curvature and the bluff at that point, which projects up something like 12 or 15 ft. above the track.

Q. And it's because of the existence of this bluff and the curvature of the tracks that the engineman's view is limited at that crossing?

A. Yes sir.

Q. Now, from the eastbound train, what limits of visibility are there?

A. The curvature and the hillside are the governing factors of the eastbound trains, which prevents them from seeing a greater distance.

Q. And on an eastbound train the visibility is 231 ft.?

A. Eastbound is 293 ft. I believe.

Q. Now, from the answer just given do you wish to correct your answer to the effect that the visibility from an eastbound train is 231 ft. and from a westbound train is 293 ft.?

A. That is right.

Q. Now, Mr. Franklin, what is the speed maintained at this point by your passenger trains first, and then by your freight trains?

A. Our maximum speed at that point for passenger trains is 40 miles per hour, and our maximum speed for freight trains is 25 miles per hour.

Q. That speed is maintained, is it not, by all trains except those [fol. 123] slowing up to make a stop at this point?

A. No, they do not all pass there at the maximum, even though they are not going to stop at that point, but they frequently reach the maximum.

Q. There is nothing to prevent them from maintaining that maximum at this point, is there?

A. Nothing other than heavy train, shortage of steam, etc.

Q. Now, Mr. Franklin, take for granted there is a crossing at the

point indicated on the map from which you have testified, would it be possible for a train to be stopped before it reached the crossing at a point at which the engineman might see an individual or wagon or any obstruction on the crossing?

A. It would not be possible, providing the train was making a speed of 10 to 12 miles an hour or better. Of course the character of the train would enter into that feature largely, as a light engine or a light train could reduce speed or stop much more quickly than a train of greater weight.

Q. But, take an average movement on this line, would you consider that a safe distance within which to apply the brakes to secure a stop before passing over the crossing?

A. I would not.

Q. Now, Mr. Franklin, on the map before you there is shown what is called a middle siding. What is the character of that siding and what is it used for?

[fol. 124] A. It is known as the Matewan middle siding for passing purposes. The track will hold from 70 to 80 cars and is very often used for the storing of cars.

Q. What do you mean by storing? Is that for making up trains or loaded trains or empty trains or what?

A. That is assembling cars on this track and leaving them there for sometime, or setting off a train on this track and leaving it there sometimes two to three days.

Q. So it is not constantly in use for passing purposes at this point?

A. No.

Q. And is it true that often cars are standing on this siding near the McCarr station?

A. Yes sir, at times it's blocked frequently and allowed to remain blocked for several days, and there are times when we will go for quite a period without blocking this siding.

Q. Up to the present time, Mr. Franklin, has it been your effort to break any string of cars at this point of this siding or the point used by Followay for carrying his freight to and from the north side of the track?

A. Yes sir, we have made an effort to keep the crossing cut at the point, but we have cut that point not only for Mr. Followay to carry his freight across the tracks but for the people getting on and off our westward passenger trains that stop at McCarr.

[fol. 125] Q. Is the postmaster of McCarr postoffice, does he carry his mail from the westbound trains across the tracks and into Kentucky?

A. Yes, sir, and it has occurred once in a while that the crossing is left blocked and as my attention has been called to the matter on a few occasions.

Q. What is the effect on the visibility on that crossing from a passenger train when cars are standing on that middle siding in the vicinity of McCarr?

A. When cars are assembled or parked on that middle track it further aggravates an already hazardous situation. The cars stand-

ing on this track shortens the distance, especially for eastward trains, in which the crossing can be seen.

Q. That is merely another element of danger to the operating of a crossing at this point?

A. Yes sir.

Q. Do you know the degree of curvature of our tracks at that point?

A. I don't remember offhand; I would say about 6 degrees, I think.

Q. That is the curvature shown on the map, is it not?

A. Six degrees curve, yes sir.

(The map referred to is here filed as "Franklin Exhibit No. 1".)

Q. Now, Mr. Franklin, your conclusion, therefore, is that this is [fol. 126] a hazardous crossing, dangerous both to the public and the railroad company?

A. Yes, sir, I consider a crossing at that point a very dangerous situation.

Q. Mr. Hicks, a civil engineer, who testified for the complainant, stated that he didn't think that was particularly hazardous and not hazardous as compared to other points of a similar character in that neighborhood. Do you agree with Mr. Hicks on that point?

A. No, I can't agree with him. I would consider a crossing at this point is equally as hazardous, if not more so, than any other crossing we have, granting that we have a good many crossings at points that we consider dangerous and hazardous, and it has been our policy all along and is still our policy not to put in additional crossings at hazardous points, but to eliminate as many of those which we consider dangerous as we possibly can.

Q. The Railway Company spends a good deal of money, does it not, in trying to eliminate hazardous crossings?

A. Yes sir, they spend considerable money annually eliminating crossings in their efforts in getting the various counties in the different states to co-operate with us as far as possible in eliminating crossings.

[fol. 127] Q. Now, Mr. Franklin, it has been testified there is an embankment on the north side of the track. Is it not a fact that the proposed roadway homes down a steep embankment?

A. How is that, Mr. Cocke?

(Question was here repeated to the witness.)

A. Yes sir, the proposed roadway does come down a steep embankment, but the embankment at the point of the proposed road is not as steep and as high as it is on both sides of this road. In other words the road traverses what you would call a small ravine up from the railroad.

Q. But there is quite a grade, is there not, just as you leave the right of way leading up to Followay's store?

A. Yes sir, I would say the grade is reasonably heavy from the railroad up to and beyond Mr. Followay's store. It is not as steep near the trunks as it is further on up in the neighborhood of Mr. Followay's store. In other words, as you go up the grade increases.



Q. Would you or would you not consider that an added element of danger?

A. Why, no, I can't say that it was, as far as the railroad is concerned. If I was going to be the driver I would consider it a dangerous proposition.

Q. That is the point of view I want you to make, that of the driver [fol. 128] coming down the hill with a loaded wagon and coming towards the crossing.

A. I don't think that this roadway is so dangerous from the point of view that you possibly have in mind. The road doesn't come directly straight down the hill, but it zig-zags, in other words, has a switch back in there, and if a man's team runs away it must steer him up on the tracks or on the side of the hill.

Q. Mr. Franklin, you know the physical details of the topography at McCarr siding, do you not?

A. Reasonably well, yes sir.

Q. Mr. Franklin, I show you three photographs. Will you identify those photographs with reference to McCarr siding and the crossing requested by the complainant?

A. Franklin Exhibit No. 2 shows this proposed crossing looking east. Exhibit No. 3 shows this crossing looking west. You will note there is a man standing in the center of the westbound track at the point where crossing is proposed. Franklin Exhibit No. 4 shows the proposed crossing looking from the north side towards the tipple in the direction of the tipple of the Allburn Coal Co. and Tug River.

Q. Mr. Franklin, in your Exhibit No. 4 is certain posts. Will you explain the reason those posts were put in?

[fol. 129] A. Those posts were planted there to prevent Mr. Followay from crossing the tracks at that point with his wagon.

Q. Mr. Followay has the privilege of crossing those tracks, though, to remove his freight, has he not, the privilege to cross back and forth to carry the freight to his store?

A. Yes sir, he has that privilege, just the same as anyone else.

Q. Who has protested against the planting of those posts?

A. My understanding Mr. Followay is the principal protestant; in fact he is the only one that we have received any complaint from.

Q. If Mr. Followay wants to remove his freight by wagon he can accomplish it by placing his wagon alongside the north track, can he not, which would necessitate carrying the freight from the south side of the tracks, if it came on an eastbound train, would it not?

A. Yes sir, he could drive his wagon down and park it near the westbound track and carry his freight from the south side tracks across the tracks to his wagon.

Q. Do you consider that unreasonable service compared to the service you give other receivers of freight throughout your district?

A. It is the same service we are giving other people at similar [fol. 130] points and who are similarly situated.

Q. An increase or different service would mean that Mr. Followay was getting something other receivers of freight do not get at other points similarly situated?

A. He would be getting it for the time being. It wouldn't be long until the other fellow would want the same service, though.

Q. Mr. Franklin, this complaint is also directed towards the lack of a station house or shed at this point. Do you own land on the south side of this track at McCarr that could be devoted to that purpose?

A. We haven't room on our property on the south side of the tracks at that point for a station.

Q. The map that you have put in evidence as Exhibit No. 1 indicates the right of way lines of the railway company, does it not, and that line on the south side touches the trestle,—the word "trestle"?

A. Yes sir, this is the map of the property at that point.

Q. And on the south side is there or is there not land on which a shed or station house could be built?

A. There is property enough there that we could build a shed of a reasonable width between the McCarr branch and the property line.

Q. The Allburn Coal Company does not demand such a shed, does it?

A. No.

Q. The only person making that demand is the complainant here [fol. 131] before the Commissioner, Mr. Followay?

A. Yes sir, he is the only man. He had as I understand several signatures signed to his petition requesting crossing and certain facilities at that point.

Q. Did you see that petition?

A. I don't recall whether I did or not; I think I did.

Q. Do you know the contents of that petition?

A. I don't remember at this time what they were.

Q. Do you know who signed it?

A. No, don't remember.

Q. Do you know whether those individuals who signed it receive freight at this point or ship freight from this point?

A. No, I don't know.

Q. It is in the record so far that Mr. Followay and the Allburn Coal Company are the only parties who are shippers or receivers of freight at this point.

A. That is the chief receivers; there might be an occasional other.

Q. And so this shed is being asked for by Mr. Followay alone, is it not?

A. That is my understanding, as I fail to see why it would be needed by any other party, as the Allburn Coal Company has stated that they move their freight across the river to their store reasonably prompt on arrival, and a station would be of no particular advantage to them.

[fol. 132] Q. Mr. Franklin, there has been put in evidence a map that shows the signatures of Meiring-Hicks & Company, engineers, Williamson, W. Va. This map shows the storehouse of John Followay. Is that location correct as respects the right of way line of the Norfolk & Western Railway Company?

A. I would say not, as this map shows the store of John Followay

some distance from the railroad property, when as a matter of fact the railroad property line runs flush with John Followway's store, fact takes in the porch.

Q. And that fact is shown on the map, your Exhibit No. 1, is it not?

A. Yes sir.

Q. So that map is not accurate in so far as it locates that dwelling or house?

A. It is not accurate as far as the location of Mr. Followway's store is concerned.

#### Cross-examination.

By Mr. Bias:

Q. Mr. Franklin, when you say the map Exhibit No. 1 incorrectly locates the Followway store, you speak from personal knowledge or simply from the maps made by the respective engineers?

A. I speak from the records and the map made by the engineers.

Q. Then, Followway's store is at the property line of the railway [fol. 133] company?

A. That is correct.

Q. You have said so far as you know Mr. Followway is the only man complaining of the conditions here. You heard Mr. Lindsey's testimony, the manager of the Allburn Coal Company, when he testified at Williamson on Friday last?

A. Yes sir.

Q. You heard him say he signed this paper addressed to the County Court of Mingo County, and also that he would like to have this crossing smoothed up?

A. Yes.

Q. You have said the map which you filed shows your right of way on the south of the track to reach to and joining the trestle?

A. At one point, yes sir.

Q. Tell me what is the matter with building the station house or storage house or shed between your right of way and this track?

A. I stated it could be done.

Q. On the south side?

A. Yes sir.

Q. Then, you have ground on the north side for a station house or shed, where it could be built?

A. I stated a shed with limited width could be erected there.

Q. At a length of 100 or 125 ft. in length could be built there? [fol. 134] A. I wouldn't say without scaling the map. You understand we would have to provide the necessary clearance, etc.

Q. Now, on the north side you have ample ground on which to build a shed a dozen times as big as the number of shippers?

A. Yes sir, to build a town as big as Blackberry.

Q. Now, Mr. Franklin, when you build a station you build it on one or the other sides of your tracks, don't you?

A. Yes sir.

Q. Then, the man who has to receive the freight and carry it from one side to the other must carry it across your tracks, if he is on the opposite side of the tracks, must he not?

A. Yes sir, naturally so.

Q. Then, if your station were here and on the north side of the tracks the Allburn Coal Company would have to cross the tracks to get to their store?

A. Yes sir.

Q. And if your station were on the south side Followay would have to cross the tracks to get to his store on the north side?

A. Yes sir, with the exception it is not absolutely necessary and seldom done that a man crosses the tracks directly at the station.

Q. He would have to cross the tracks some place?

A. Yes sir.

[fol. 135] Q. The topography of the ground is such here as that a crossing over your tracks any distance east or west of the proposed crossing would not make a man able to reach the station at the crossing?

A. Not without building additional road.

Q. Something has been said by Mr. Cocke about the approach from the north side of the track. As a matter of fact the crossing on the north side is not steep for 100 ft. or more from your track, is it?

A. Well, as I stated, it is not as steep directly after leaving the tracks as it is farther up. I wouldn't say 100 ft. before you strike that increased grade.

Q. Well, it's considerable distance in length before any steep grade is encountered at all?

A. Well, the grade is not level by any means, leaving the railroad going up the hill.

Q. Mr. Franklin, has the railway company any other reason for blocking this crossing or refusing to make a grade crossing than the danger or hazard the using of the railroad crossing would have?

A. That is the real purpose in objecting to a crossing at that point, is the hazard feature.

Q. Any other reason why you object?

A. No other reason, no, except as I stated awhile ago, if we give [fol. 136] this service here we will have to give it elsewhere.

Q. Can you tell the Commission the name of another point on your railroad where a person receives freight and can't reach it at a crossing?

A. We have a large number of points where he can't cross the tracks at the point of unloading, and where he has to carry his freight across the tracks and load on the wagon on the opposite side.

Q. You mean you have a number of places where you unload freight on the ground and no freight crossing at that point, but have on any place on your division where you unload freight on the ground and where the consignee of that freight can not reach it with wagon?

A. We have a number of places where he can't reach the same side the track on which his freight is unloaded with a wagon.

Q. Without traveling how far?

A. Can't do it at all, without the building of additional road.

Q. Where?

A. Well, one place is Sprigg.

Q. You are sure of that? Have you recently looked about that?

A. Yes, sir, look at it every day or two. Also in reference to Sprigg, there was someone come down to the south side of the tracks with his wagon by coming down an auxiliary track that we have [fol. 137] south of the main track, and we put up barriers or posts to prevent him doing it to eliminate the hazardous feature. He was like Mr. Followay, he pulled the posts up but we planted them back.

Q. You mean to tell the Commission a man who receives freight at Sprigg on the south side of the track can't get to that with a wagon now?

A. No sir.

Q. How near to Sprigg is the place where you unload freight; is there a crossing over your tracks from the south side and vice versa?

A. There is a private crossing a few hundred feet east of Sprigg.

Q. Now, you have spoken also of Rose siding. The chief consignee at Rose siding is the Thacker Mining Company, is it not?

A. That is my understanding.

Q. And the store and commissary and camp of this company is south of your tracks?

A. Yes sir.

Q. And any freight coming from the west is put off or unloaded on the tracks?

A. Yes sir.

Q. Do you happen to know all the freight received by that company is from the west, as in the case of Mr. Followay at McCarr?

A. That isn't what the Bluefield merchants tell me.

Q. Do you have any knowledge of that?

[fol. 138] A. I know we do unload freight at that point coming from the east, westward trains, but I am not in position to speak as to how much.

Q. Where do they cross the tracks by vehicles to reach Rose siding?

A. Well, there is no point close. There is a crossing, a private crossing, down near Lynn, about a mile west of this point, but the conditions are such if they come down to that point they can't get back to the store without building roads.

Q. In other words, if they cross from the north side to the south side they can't get up the river bank without roads?

A. Yes sir.

Q. Where you have stations, Mr. Franklin, and freight is taken across tracks by your employees, isn't it?

A. Where you have regular stations and agents maintained we do that, but where we have shelter sheds and no agent it is not the common practice to do that. We have a specific case of that kind at Sprigg; we have a shelter shed and a combination passenger and freight shed on the north side of the tracks. The majority of the freight for that point is unloaded on the south side of the tracks and the people getting the freight at that point carry it across the three tracks; as a rule where we have agencies we have stations.

[fol. 139] Q. You say at Sprigg siding you have a shelter shed on the north side of the tracks?

A. Yes sir.

Q. And freight going from the west for deposit at Sprigg you don't put in the shelter shed?

A. No.

Q. What is the purpose of the shed?

A. The shed, while it is a combination shed, is used primarily and principally for protecting passengers from the rain.

Q. Then, it is not a freight shed at all, except when you see fit to use it for freight?

A. It is a combination shed, but the freight is not put in it to any extent.

Q. Was that put there at the instance of the complainant by the Commission or put there of your own initiative?

A. I don't remember now.

Q. Mr. Franklin, you say you have been on this division for nine years. For how long to your knowledge has this point at McCarr been crossed by vehicles?

A. It wasn't crossed to my knowledge until about a year or fifteen months ago, notwithstanding it has been claimed it has been crossed regularly. About twelve or fifteen months ago we noticed signs of a wagon having crossed at this point and, realizing the hazard of such [fol. 140] a movement, why we put up posts there to prevent it. Those posts were pulled up once or possibly twice but we replanted them and they have been standing there now for some months.

Q. Been standing there since about three days before this complaint was made?

A. I don't remember as to that.

Q. You say about twelve or fifteen months ago we discovered signs of a wagon. Do you mean to imply whoever was wagoning across here was doing it secretly or do you mean that was the first time it came to your personal knowledge?

A. That was the first time it came to my personal knowledge.

Q. You heard the testimony of witnesses at Williamson on Friday to the effect this crossing had been used 15 or 20 years, and heard Mr. Followay testify he had used it for ten years and frequently hauled across there. You are not in position to dispute that, are you?

A. I can only speak of what I know personally; no use for me to tell this Commission what I have heard.

Q. Was that a regularly maintained grade crossing there when you came on as superintendent of this division?

A. No and never has been since that time.

Q. Well, you understand it had been in the past regularly maintained as a grade crossing and timbered and kept up as such?

A. Not to my knowledge, no sir. I can only testify back for nine or practically ten years.

Q. You heard Mr. Followay's testimony to the effect it had been a grade crossing there and timbered and kept up as such?

A. As I remember Mr. Followay testified that was done; that ante-dated his locating at McCarr, when the property was owned by a man named McCoy, who owned a farm and the railroad ran through the farm and he had a private crossing there so that he could get from one part of the farm to the other.

Q. But you also heard him say when the Pike Collieries went in there it was then maintained as a grade crossing; you don't know anything about that?

A. No sir.

Q. Have you attempted to learn whether or not he was correct in saying it was regularly maintained as a crossing for years?

A. Nothing more than talking to our people in charge of the property at that point and, while the railroad people are constantly changing from one point to another, and they say to their knowledge there has never been a crossing there.

Q. You don't know about it?

A. No.

[fol. 142] Q. Mr. Franklin, it has been suggested by questions asked you and answers made thereto that Mr. Followay has liberty to carry his freight across your track. Is there any reason why your freight handlers shouldn't carry that freight across the track to where his store is or where he could reach it with a wagon?

A. Yes sir, I think there is a reason why we shouldn't to it. We wasn't particularly responsible for Mr. Followay starting a store on that side of the track.

Q. Suppose you had a freight station there, you necessarily would carry it across your tracks, if they were local shipments, wouldn't you?

A. I explained that a while ago. If we had a regular agent there with an agency we would have to make some provision to get the freight in the station.

Q. You distinguish between a freight station where you maintain an agent and where you don't?

A. Yes sir.

Q. In other words, you tell us where you have a freight shed without an agent you don't put it in the station?

A. That is right, except in some isolated cases and certain commodities that easily damage by the inclement weather.

Q. How about flour and feed and meal?

A. If it's bad weather we generally try to protect the flour and [fol. 143] meal by placing it in the shed, but if the weather is good we do not put it in the shed.

Q. What is your notion, Mr. Franklin, as to the solution of this problem of Mr. Followay's here, assuming that you are correct in your position that a grade crossing should not be opened and maintained?

A. I feel, since Mr. Followay gets his freight there that it is nothing more than reasonable and fair that he should be afforded the privilege of carrying it across the tracks. This freight stop was established for the accomodation of the coal company; Mr. Followay came along later years and started a store at that point. Well, of

course he had his goods billed and shipped to that point, notwithstanding he was only located about 5,800 ft. from Matewan where there is a station and agency maintained, and I feel that it would not be unreasonable for Mr. Followay to have got his freight from Matewan, where he can get service. If he still desires to have his freight shipped to McCarr for his own convenience, all he is entitled to at a point of that kind is means of carrying it across the tracks and placing it on his wagon.

Q. You say the stop was given to the coal company. Does the railroad company discriminate between the coal company and any other consignees?

[fol. 144] A. No, we do not.

Q. Mr. Franklin, the coal company can get to its freight on the south side and does with a wagon, does it not?

A. Well, from personal observation, as Mr. Lindsey stated the other day, they do drive a wagon up to the south side of the track, but on this bridge they have a tram-road, they use a truck as a rule or did; whether they do yet I do not know, but if any freight comes to them from the east it is unloaded on the north side of the tracks, which puts them in the same category as that of Mr. Followay, in reference to his freight being unloaded on the south side of the track.

Q. You unload your freight from the east on the north side and from the west on the south side?

A. Yes sir.

Q. But, as in the record, practically all his freight comes from the west, then that imposes on him a hardship as distinguished between the others—I mean all his freight from the west, he has to cross the tracks and the others do not?

A. Yes sir, if, as stated, Mr. Followay and the coal company are the principal receivers of freight at that point, and if they both buy from the west in the same proportion, of course Mr. Followay is somewhat adversely situated to that of the coal company.

[fol. 145] Q. The railroad company has no knowledge of any accidents occurring at this crossing?

A. If they have, I have no personal knowledge of any accidents at this crossing. You understand at this point I am not going on record as saying there is any crossing there or ever has been.

Q. There is danger at all grade crossings, isn't there?

A. Yes, sir, there is.

Q. What is the provision made by statute in this state as to the warning of approach of trains at public crossings?

A. Why, sounding the whistle, ringing the bell of the locomotive.

Q. As you approach?

A. Yes sir.

Q. The same provision could and would, if thought advisable, be maintained as to private crossings?

A. It could be.

Q. And would serve as a warning to the users of the crossing, whether or not the approach of the train could be seen?

A. Ordinarily, yes, sir, but at that particular point you couldn't



hear either the bell or the whistle for the noise made by the shaker screens of the coal company.

Q. That, of course, occurs at any other crossing, a noise sometimes prevents hearing the trains?

A. Very seldom.

[fol. 146] Q. Mr. Franklin, you have a number of grade crossings, both private and public, which are worse than this, have you not?

A. No; as I stated I don't know of any place—can't imagine a place being any more hazardous than at that point.

Q. But you have grade crossings and curves in the track, don't you?

A. Yes sir.

Q. And at West Williamson you have them at either portal of the tunnel?

A. Yes sir.

Q. And closer to this tunnel at either end than the visibility point at the grade crossing at McCarr siding, is that right?

A. I don't know as to that. Of course as I remember it—that is off my division—but as I remember the situation the view to one of the crossings which you speak of from the east is very good, and the view from the west of the other one is reasonably good, but I don't know just how far you can see a train emerging from the tunnel, but from what little I know about the situation on that division, I consider both points very dangerous.

Q. All grade crossings are dangerous?

A. Sure, all road crossings are dangerous and the hazards are increased frequently by the physical condition.

[fol. 147] Mr. Cocke:

Q. Mr. Franklin, the fact you have a dangerous crossing at one point is no reason for putting a dangerous crossing at another point, is it?

A. No, it is not, and as I stated awhile ago we are opposed to putting in crossings at any hazardous point and are working with a view of eliminating some of those we already have.

Mr. Bias:

Q. The fact you don't give service at one place is no reason for not giving service at another, is it?

A. No, I would say not.

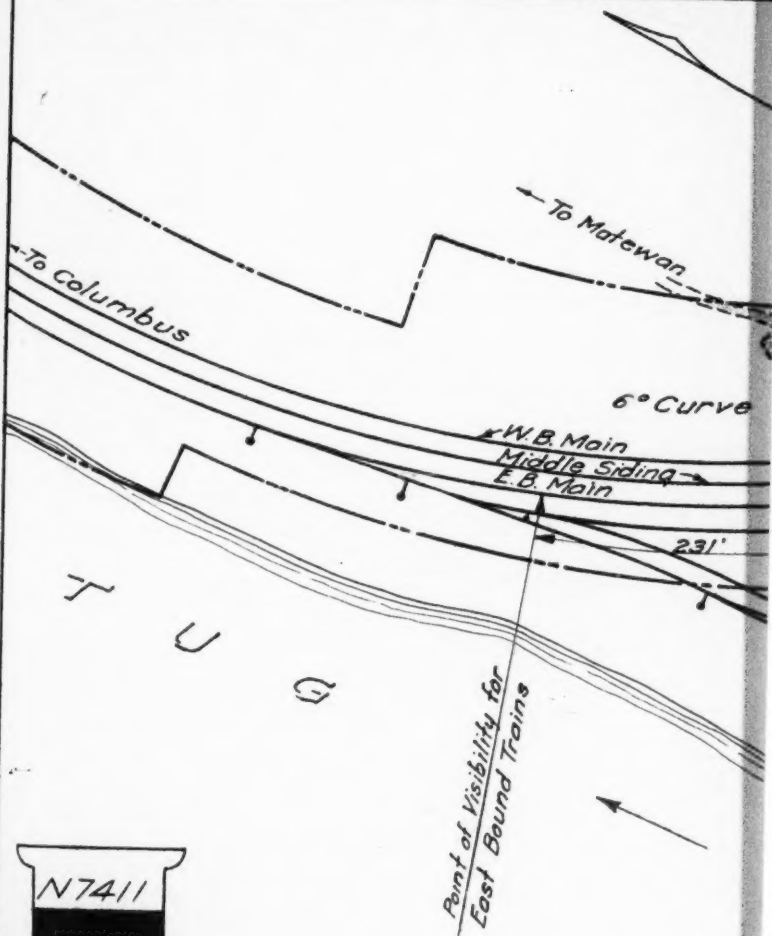
Mr. Cocke: Unless those are similarly situated?

A. Yes, sir, and I don't feel that a railroad could reasonably be expected to establish either a crossing or a station at every few hundred yards.

Q. You feel that it is unreasonable to request a utility like a railroad to permit vehicles to cross its tracks at any station?

A. I think it is, providing other arrangements could be made.

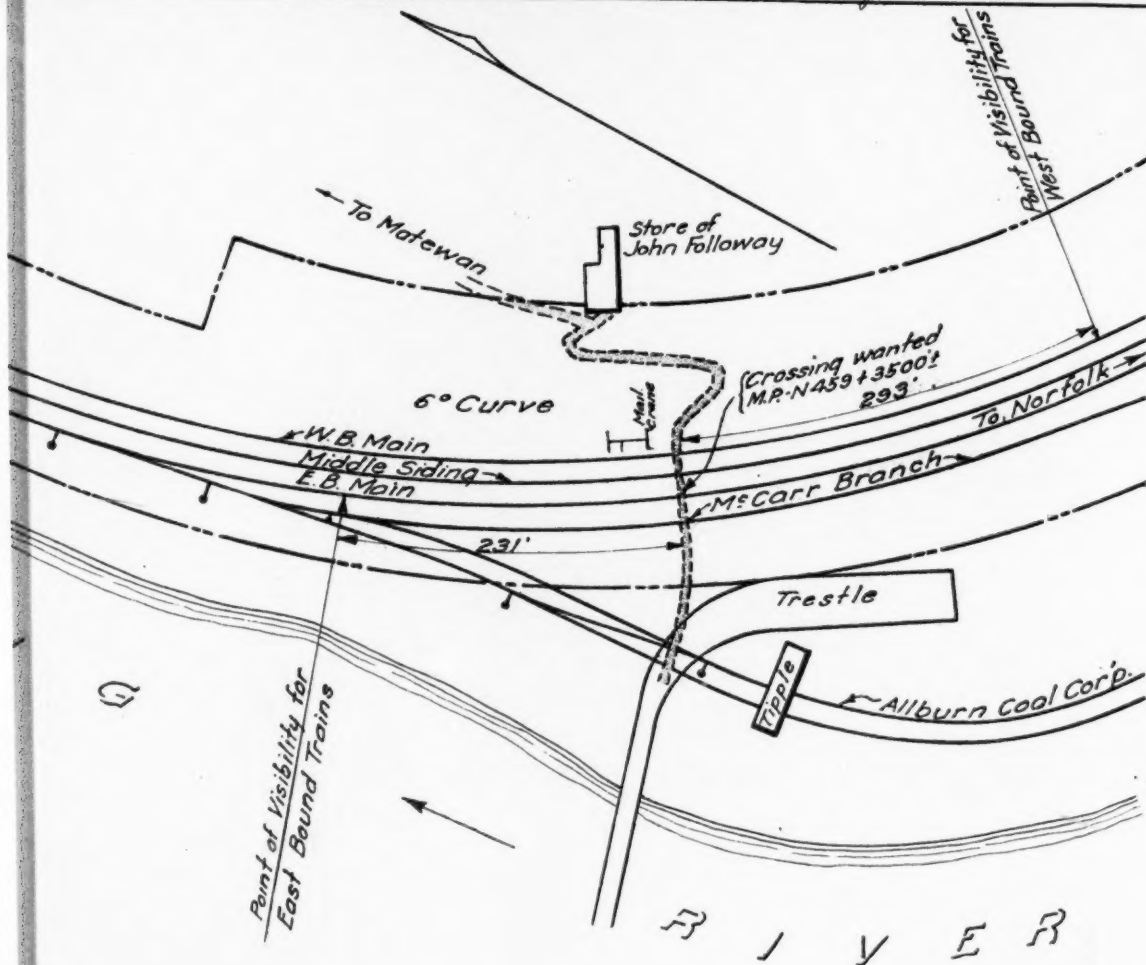
Exhibit 1 to Form



From Sketch & V13WV.82

Exhibit 1 to Franklin's Testimony

148A



NORFOLK & WESTERN RY. CO.

PLAN SHOWING ROAD CROSSING  
WANTED BY

JOHN FOLLOWWAY

M.P. N 459 + 3500 ±

McCarr, Mingo Co, W. Va.

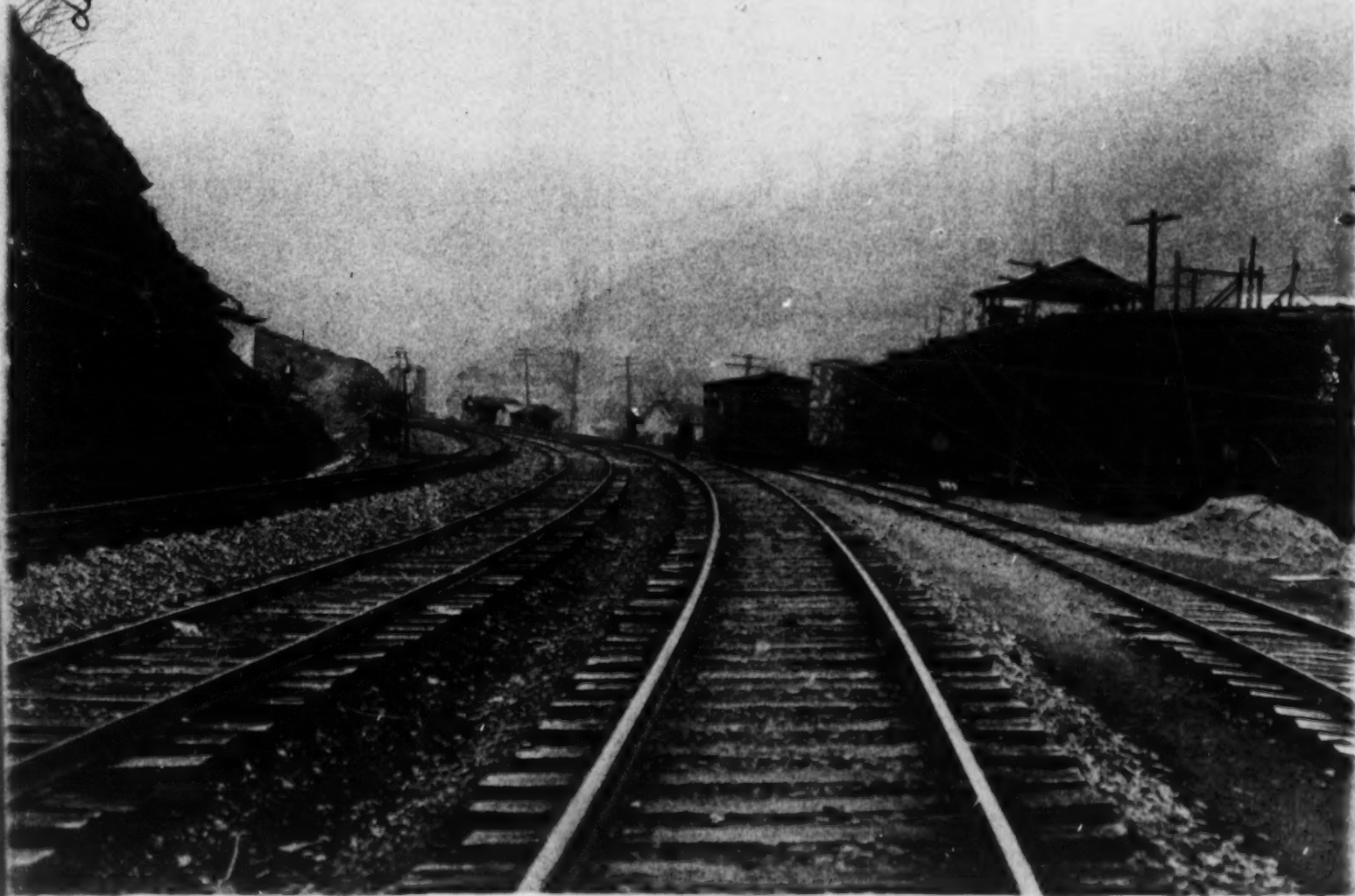
Scale 1" = 100'

Sketch & V13WV.82

Office of Chief Engineer, Roanoke, Va. Dec. 28, 1921

N7411

Looking East



148-B

Looking West

148-C

*Looking South*



148-D





Mr. Bias:

Q. Take a man who gets the freight Mr. Followay does, do you regard it as unreasonable for him to cross your tracks to get his freight with a vehicle?

A. Yes sir, I would say so.

Q. Do you happen to be familiar with grade crossings a mile or [fol. 148] so east of this point at and around Lynn?

A. Yes sir.

Q. How many have you there? Haven't you three within a distance of 1,000 ft. or four—I mean public and private?

A. No, there is two crossings and two private crossings on the tangent at Lynn.

Q. Only two?

A. That is all.

Q. A private crossing was put in at the Lynn tippie within the last year or two for the accommodation of the Lynn Coal Company?

A. Yes sir.

Q. How close is that to their tippie?

A. That is a pretty short distance from that tippie.

Q. Mr. Followay tells me there is a crossing 300 or 400 ft. east and west of that crossing. Is that correct?

A. There is a farm crossing,—in fact two parties owning farms there in a distance of  $\frac{3}{4}$  of a mile, that a portion of the property is on one side and a portion on the other of the tracks, and they were provided with private crossings; they don't use them very often, but we have always provided crossings under conditions of that kind.

Q. Well, these are available for use of the Lynn Coal Company, aren't they?

A. If they wanted to trespass on the other man's property they are.

[fol. 149] Q. They can't reach them from their own property on the public road?

A. Well, they might reach them from the public road on the north but not on the south.

The witness is excused.

(Here follow Exhibits 1, 2, 3, and 4 to Franklin's testimony, marked side folio pages 148a, 148b, 148c, and 148d.)

### *Rebuttal.*

Thereupon the witness JOHN FOLLOWAY was here recalled for further

Direct examination.

By Mr. Bias:

Q. There has been some testimony about the grade crossing at Lynn, about a mile east of McCarr siding. Are you familiar with those crossings?



A. I am.

Q. Until a year or two ago how many crossings were there at and about Lynn?

A. *They* was a couple.

Q. Private or not?

A. Private crossings.

Q. Within the last year or so has there been another one put in there?

A. Yes sir.

[fol. 150] Q. For what purpose?

A. For the purpose of a farmer getting from his farm across the track.

Q. And there has been one put in for the Lynn Coal Company?

A. Yes sir.

Q. How recently?

A. Well, two years ago.

Q. How close to the crossing put in for the Lynn Coal Company were the other crossings across the tracks?

A. Well, one about 400 or 500 ft. above this crossing and one about 400 ft. below this tipple.

Q. Was there any reason why the shipper couldn't cross at either of these crossings?

A. I didn't see any, as the coal company has property on both sides of the railroad under lease.

Q. Then, the shipper for whom this crossing was installed owns the land on either side of the track and could reach it 300 or 400 ft. east or a like distance west?

A. Yes sir.

Q. Something has been said about the freight facilities at Sprigg. Are you familiar with those?

A. I went down there and examined them.

Q. Since you testified last Friday?

A. Yes sir.

Q. Is there a situation in which you find yourself, in that the consignees' goods are unloaded at that point and can not be reached [fol. 151] with a wagon?

A. No sir.

Q. What are the facts about the accessibility to the freight?

A. Well, there is a crossing 300 or 400 ft. east of Sprigg, put in for a man that has a piece of land over there and these merchants can use the siding on the north side where this freight is put off on the west side going east.

Q. You speak of the merchants on the north side of the track?

A. Yes sir.

Q. And whose freight is unloaded from eastbound trains on the south side?

A. Yes sir.

Q. And they go 300 or 400 ft. east of this crossing and drive down there. Are there posts in there?

A. Yes sir, they put them first in the track—a spur run back to the east and you go back on the right of way, and they can go down the bottom.

Q. Are they doing that?

A. I don't know.

Q. At your place you can't do that at all?

A. No sir, and one of the biggest merchants up there told me that freight consigned from Wheelersburg, Ohio, that they got permission to set cars over there——

Q. You mean freight consigned from Wheelersburg, Ohio, is placed for merchants on the north side of the track or siding on [fol. 152] the north side?

A. That is what the merchants informed me down there the other day.

Q. Mr. Followay, Mr. Cocke asked his witness something about the people served at McCarr siding. What number of people use McCarr siding for freight or passenger service?

A. Well, me and the Allburn are all the shippers that amount to very much; another man there by the name of De Hart uses it frequently for getting in flour and meal and feed and also several people use it in getting like shipments.

Q. I want to know what number are served by this station, both as to passengers and freight?

A. Well, I would judge for people catching local trains, I would just 1,000 people, Blackberry Creek and those two coal companies—I mean the two coal companies on the Kentucky side.

Q. What are those companies?

A. Allburn and Alma-Thacker.

Q. And their employees use this as a passenger point?

A. Yes sir, for all passenger trains stopping there.

Q. And they get off the trains there also?

A. Yes sir.

Q. And Lynn the same?

A. Yes sir.

Q. You estimate about 1,000 people use this point as a passenger point?

A. Yes sir.

Q. How do they get across these tracks? Suppose a man is living [fol. 153] in Kentucky and he comes in on the westbound train, how does he get to his home from McCarr?

A. He has to cross the tracks.

Q. Suppose he lives in Blackberry City and comes in on the east-bound train?

A. He has to cross the tracks.

Q. Then, there is no crossing facilities for passenger or for freight, is that true?

A. Yes sir.

Q. What is the condition of the tracks and space between the rails and the roadbed at McCarr now with relation to crossing tracks?

A. Well, the track is just like any other point where the track is ballasted very high; of course you have to climb up over the ballast.

Q. And is very deep ballast, very high, at that point, a foot or more?

A. Yes sir, or 20 inches part of it and the other not so high.

Q. What will be the effect on you and your business, Mr. Followay, if you are prohibited from getting freight at this point and reaching it with vehicle to carry to your store?

A. The effect would be I would have to hire men and buy a team; it would figure at the least 5 per cent on my business.

Q. How much per month?

A. \$200.00 a month.

[fol. 154] Q. Is that prohibitive to you in your business?

A. It is.

Q. Then, what will the effect be if you are not allowed to cross the tracks?

A. The effect will be I can't run my business and carry the goods across the tracks.

Q. Since you testified on Friday have you had occasion to carry goods across the tracks?

A. Yes sir, had a car unloaded on the third.

Q. What expense did you incur by reason of having to carry this freight across the track at this point?

A. Well, I got a part carried over for five cents a bag and then they quit on me and I had to go and give some more fellows \$2.00 a ton and some of them I gave a dollar an hour to unload it.

Q. What was the expense of that?

A. \$33.47.

Q. What would have been the expense of hauling it across there?

A. Well, two men would have took half a day and one man principally one day; that expense would have been \$10.00—about \$8.00.

Q. Then, the additional cost to you of this particular car was about \$25.00?

A. Yes sir.

Q. Mr. Followay, speaking with your ten years' experience handling freight across there, would it or not be more hazardous to you and the railway company if you take this freight across there [fol. 155] by hand or by wagon?

A. I believe it would be more hazardous by hand.

Q. Well, take your own case or your employees, do you figure the risk of accident to them would be greater if they try to get across the tracks, as you want to do, or as proposed by the railroad company?

A. Yes sir.

Cross-examination.

By Mr. Cocke:

Q. Mr. Followay, that crossing as to which you testified at Sprigg is a private crossing, is it not?

A. They informed me it is.

Q. You just testified as to what they told you when you went down there?

A. Yes sir, but the crossing is there and been crossed by wagons.

The witness is excused.

Commissioner Wiles: I would like to ask Mr. Franklin a question or two.

Q. Mr. Franklin, what would be the objection to set shipments for the complainant in carload lots on what you call the middle siding at this point?

A. That would be entirely impracticable because that is not what [fol. 156] you would call a commercial siding. It's for operating a train service and if you placed a car on that track, why it would be subject to be knocked out of place by assembling cars on that siding or using it as a passenger siding.

Q. Where are carload lots set, delivered to the complainant, with reference to the proposed crossing?

A. We have accom-odated Mr. Followay to the extent of placing those cars near the junction of the McCarr branch, which is shown on Exhibit 1. That is also very objectionable and should not be done, but we do not use that track to exceed once a day when the Alma-Thacker Coal Company is working. They haven't worked for a long time, consequently we can place these cars without any particular inconvenience.

Q. Have you any commercial siding at this point?

A. None whatever.

Q. The complainant stated at Williamson that his freight was unloaded up and down the track on the south side, anywhere within a distance of 150 ft. Is there any reason why less than carload freight shouldn't be unloaded at or near the crossing?

A. No sir, no particular reason why it shouldn't be unloaded at or near this crossing, and the train crew in unloading freight at that point possibly do scatter it out some little distance, in order to work several cars without moving the train. Of course by spotting the [fol. 157] cars to be worked at or near the crossing the freight could be put off in very close proximity to this proposed crossing.

Q. Does the Norfolk & Western build what is generally known as a standard shelter shed for freight and passengers?

A. Yes sir, we have two or three types of shelter sheds. We have a combination shelter shed and a straight out passenger-shelter shed, and the size of the building is governed to some extent by the conditions.

Q. What would a shelter shed\*that would meet the requirements for less than car load freight at that point cost?

A. Why, I can't say definitely, but since it would serve no one other than Mr. Followay I would say a shelter shed could be provided to take care of his freight for \$800.00, not to exceed \$1,000.

Q. The building itself would cost that much?

A. I should think so. That is approximate figures.

Q. Some of the railroads build a shed about 9 by 13 ft., very much less expensive than that. Have you any such sheds as that?

A. I don't remember what the dimensions of our sheds are.

Q. This is a three-sided building, one side being open.

A. When we build a shelter shed—of course as I stated before we have different types—but as I stated before, as a general proposition [fol. 158] where we build shelter sheds is at points where people re-

ceive freight that live, that do business some distance away and can move their freight away promptly, possibly has to remain there over night and at some points the freight part is inclosed, has a door and a lock and maybe somebody around will keep the key and take charge of the place to protect a certain man's freight.

Q. What would be the expense of constructing a crossing level with the tracks at that point, and of a width sufficient to carry a truck somewhat similar to that used by express companies and railroad companies in handling freight around stations?

A. That wouldn't cost a great deal. I can't say definitely but I would say possibly \$50.00. You understand, your Honor, to put in an arrangement of that kind, there is three tracks involved; we would have to provide crossing planks of the length of the dimension of this kind of a crossing and fill in with cinder or something and make it as level as possible; of course the tracks at that point are not all on the same level,—a slight variation in the height of the tracks at that point, but a reasonable crossing of that kind I would say would be constructed for \$50.00, not to exceed \$75.00.

Q. Is the condition of the ground and tracks at that point of such [fol. 159] character that, with a crossing of that kind, a truck of the character I have mentioned, could be run alongside the car, and the goods unloaded on the truck and hauled across the track to the other side without very great expense of a runway or maintenance?

A. Yes, sir, that could be done.

Q. Now, pursuing this matter further, what would be the expense of building and maintaining a crossing that would be safe and suitable for horse-propelled vehicle, wagon or cart?

A. Well, I would say that the expense would possibly be double over and above what you just spoke of.

Q. What objection would there be, from the standpoint of the railroad company, to the construction of such a crossing for the use of this shipper and the complainant, provided it were conditioned upon the maintenance of a gate on the north side of the railroad and that gate be kept locked and the general public excluded, so far as vehicles are concerned?

A. The hazard is the objection and the gate wouldn't eliminate or decrease the hazard in any way.

Q. What would be the difference in the hazard of this crossing if used by vehicles drawn by teams rather than by a man drawn vehicle like an express car or something of that nature?

A. Well, I would say that were be a difference. They would both [fol. 160] be extremely hazardous; if a man is rolling a barrel of oil or carrying a box across there and a train comes scooping down on him, he will turn that loose and get away, but if he is out there with a team, a vehicle drawn by horses, naturally he is going to make some effort to save or protect his team and in so doing the chances are he will get killed.

Chairman Lewis:

Q. Well, from the standpoint of hazard, the crossing for man-drawn trucks or vehicles would be safer than the matter of rolling or carrying a barrel across, under those conditions, wouldn't it?

A. No, I would say not, if I get your question correctly. Of course if a man is either pulling the vehicle or rolling a barrell or carrying a box, of course he is going to try to save himself, regardless of protecting the property.

Q. I mean, wouldn't it be safer for the man pulling the truck across or shoving a truck across than trying to get across there now under present conditions?

A. Yes sir, I would say so. I would say if we would put in a crossing, such as spoken of a while ago, it would be safer for a man either carrying or pulling freight across there with a man-propelled vehicle than it would be crossing there with a wagon at this particular time, because the present situation is particularly dangerous.

Q. I am speaking of crossing with a barrel of oil or some heavy article.

[fol. 161] A. Yes sir. I would add, if we would provide a crossing of any character, filling up between those tracks, etc. it would be much safer than the present, nothing in the present situation.

The witness is excused.

Mr. Bias: Mr. Followay, my client and the complainant says, he fears that the elevation of these tracks there is such and the situation there such that the man-propelled truck theory is impracticable. He feels he can't pull one of these express trucks or shove it over these tracks without enormous expense and regarding of your roadbed there. On the other hand, however, Mr. Followay, so far as he is personally concerned, would be amply content to have the project suggested by Judge Wiles of having a crossing for vesicles there, put in at his own expense and maintained at his own expense, and give you any release you want as to liability for accidents to himself or his employees, and maintain a gate there and leave two or three feet for pedestrians going across there, and the gates kept locked against any man that didn't have freight to bring across there.

Mr. Cocke: Could Mr. Followay close that with a gate?

Mr. Bias: A gate could close that as well as your posts could. He [fol. 162] could swing a gate on one of your poses.

Mr. Franklin: People leaving our tracks at that point to the north can go through these posts. They would get tired of climbing Mr. Followay's gate.

The case was thereupon argued and submitted.

[fols. 163 & 164] REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

Public Service Commission, To wit:

I, L. W. Stanard, Official Reporter for the Public Service Commission of West Virginia, hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the testimony adduced before the Public Service Commission of West

7  
9

Virginia, in the matter of complaint of John Followay against Norfolk & Western Railway Company, taken at Williamson, W. Va. on February 3rd and Charleston, W. Va. Feb. 8th, respectively, 1922.

Given under my hand this the 10th day of February, 1922.  
 ————, Official Reporter.

[fol. 165] THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,  
 CAPITOL BUILDING, CHARLESTON

A Meeting of the Public Service Commission of West Virginia Held  
 on the 11th Day of March, A. D. 1922

[Title omitted]

Formal Complaint

#### FINDINGS OF FACT AND ORDER

This day this case came on to be heard upon the petition of the complainant, John Followay; the answer of the defendant, Norfolk & Western Railway Company; the evidence taken on behalf of the complainant and the defendant, and argument of counsel:

Upon consideration of all whereof, the Commission doth find:

(1) That the complainant, John Followay, is now and has been for the past ten years, engaged in the general mercantile business, at Blackberry City, a village located about 5,800 feet east of the Town of Matewan, on the main line of the said railway company; that the complainant's gross sales average from \$4,500 to \$5,000 per month; that the merchandise handled and sold by the said complainant is shipped and transported and delivered to the complainant by the defendant railway company, at a point on its lines a short distance east of Matewan, known as McCarr Siding; that most, if not all, of the said goods and merchandise carried as aforesaid, originate at points west of Matewan, and are carried in both carload and less than carload shipments; that the goods carried in less than carload lots are deposited on the south side of the defendant railway company's tracks, at a point approximately opposite the complainant's place of business, and the carload shipments delivered at approximately the same point; that the place of business of said complainant is located on the north side of said railway company, and that said goods must be transported by the complainant a distance of about [fol. 166] 100 feet across four intervening tracks of the defendant company in order that the same may be deposited or stored in the ware house or store room of the complainant.

(2) That for a number of years past it has been the practice and custom of the complainant to haul the goods shipped and delivered to him, as aforesaid, across the tracks of the said defendant railway company to his place of business, but that within the past twelve

months the said defendant railway company has prevented the complainant from hauling said goods across said tracks, as aforesaid, by planting posts on approximately five foot centers for a distance of about fifty feet along its right of way on the north side of its tracks, so as to obstruct the crossing theretofore used by the complainant, and to effectually prevent the use thereof for all vehicular traffic; that by reason of said obstruction the complainant is now compelled to carry said goods, by hand, across said tracks, at an expense greatly in excess of that required to transfer the same by hauling; that the said defendant railway company provides no facilities for the protection of goods unloaded, as aforesaid, from exposure to the weather, and that the delay in the transportation of said goods caused by the failure of the defendant railway company to afford the complainant reasonable facilities for the removal of the same from the premises of said defendant railway company, to the place of business of the complainant, has caused the complainant further damages and expense.

(3) That the complainant pays the defendant railway company approximately \$300 per month as freight for the goods carried by it, as aforesaid, and in consideration thereof prays that the defendant railway company be required to afford him reasonably adequate facilities for the storage of said goods while on the premises of the said railway company and for the transportation thereof from and across the premises of said defendant railway company to the complainant's place of business.

(4) That McCarr Siding, the point at which said goods are delivered by the defendant railway company, as aforesaid, is located on a curve near a deep cut, and that by reason of such location the [fol. 167] view of the crossing proposed to be established by the complainant is so obstructed that the engineer and fireman operating trains approaching said crossing can see same for a distance of less than 300 feet. For this reason the defendant railway company objects to the establishment of a crossing at this point, as prayed for by the complaint, upon the ground that the establishment and use of such crossing is dangerous, not only to persons using said crossing, but to the operation of trains upon the tracks of said railway company.

From all of the foregoing, the Commission is of opinion that the revenue afforded the defendant by the complainant's business is not sufficient to justify the expenditure required for the erection and maintenance of a station house, or other structure, for the protection of the goods shipped and delivered to the complainant, as aforesaid; but is further of the opinion that the facilities now furnished the complainant by the defendant railway company, for the removal of goods from its premises, carried and delivered by the defendant to the complainant, as aforesaid, are unsafe, insufficient, inadequate and unreasonable, and that the defendant railway company should be required to afford the complainant reasonably safe and suitable facilities for the removal of goods shipped and delivered to him, as afore-



said, from the premises of the defendant railway company to his place of business.

It is, therefore, ordered that the defendant, Norfolk & Western Railway Company, do, within thirty days from the date hereof, construct, and thereafter maintain, a reasonably safe and suitable roadway across its tracks at or near the point where said crossing was formerly used by the complainant, as aforesaid; to be not less than eight feet in width, and to be so constructed and maintained as to render the same reasonably safe for the use of vehicles crossing said tracks; subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of good and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) The entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) While said crossing is being used by the complainant, as aforesaid, for the [fols. 168 & 169] transportation of goods across said tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing for the purposes aforesaid.

A Copy. Teste:

(Signed) R. B. Bernheim, Secretary.

[fol. 170]

#### SECRETARY'S CERTIFICATE

STATE OF WEST VIRGINIA,

*The Public Service Commission, To wit:*

I, R. B. Bernheim, Secretary of The Public Service Commission of West Virginia, do hereby certify that the papers herewith are all papers, documents, evidence and records, or certified copies thereof as were before The Public Service Commission at the hearing or investigation resulting in the entry of the order from which the petitioner appeals in the matter of: Case No. 1309—Formal Complaint—John Followay, vs, Norfolk & Western Railway Company, in which an appeal is pending from The Public Service Commission to the Supreme Court of Appeals of West Virginia.

Given under my hand and seal of the Commission, at the City of Charleston, this 13th day of April, A. D., 1922.

(Signed) R. B. Bernheim, Secretary. (Seal)

[fol. 171]

#### IN SUPREME COURT OF APPEALS

#### ARGUMENT AND SUBMISSION

At another day, to-wit, on the 10th day of May, 1922, the following order was made and entered:

4618

[Title omitted]

Upon Petition for Suspension of an Order of the Public Service Commission of West Virginia Entered on the 11th Day of March, 1922

This day came the petitioner, by Holt, Duncan & Holt, Theo. W. Reath, Lucian H. Cocke and Lucian H. Cocke, Jr., its attorneys, and respondent, John Followay, by Bias & Chafin, his attorneys, and this case was fully heard upon the petition filed herein, the papers, documents, evidence and records, or certified copies thereof, together with a statement of respondent, Public Service Commission, of its reasons for the entry of the order complained of, and the arguments of counsel thereon, and is submitted for decision.

---

### IN SUPREME COURT OF APPEALS

#### DECREE

At another day, to-wit, on the 30th day of May, 1922, the following order was made and entered:

4618

[Title omitted]

Upon Petition for Suspension of an Order of the Public Service Commission of West Virginia Entered on the 11th Day of March, 1922

The Court, having maturely considered the petition filed in this case, the papers, documents, evidence and records, or certified copies thereof, the statement of the Public Service Commission of its reasons for the entry of the order complained of, and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that the petitioner has not shown itself entitled to the relief prayed for in the petition filed in this case. It is therefore [fol. 172] considered by the Court that the order of suspension prayed for in this case be and the same hereby is refused and that the petition filed in this case be and the same hereby is dismissed, and that respondent, John Followay, do recover from the petitioner his costs about his defense in this Court in this behalf expended.

It is further ordered by the Court that leave be and the same hereby is given to respondent, Public Service Commission, to withdraw from the office of the Clerk of this Court all the papers, documents, evidence and records which have been filed in said office in this case.

All of which is ordered to be certified to the Public Service Commission.

The decision of points in the foregoing case, as the same appear from the syllabus and written opinion prepared by Judge Miller, was concurred in by Judges Poffenbarger, Ritz, Lively and Meredith.

The decision of points as shown by the syllabus and written opinion aforesaid are in the words and figures following:

[fol. 173]

IN SUPREME COURT OF APPEALS

[Title omitted]

OPINION

On Petition to Suspend Order. Order Affirmed.

Miller, Judge

1. The Public Service Commission, by virtue of sections 4, 5 and 11, chapter 15-O, Barnes' Code 1918, upon the application of any person, firm or corporation, has power to require a railway company to conform its conduct and policies to the laws of the State, and to all rules, regulations and orders of the commission not contrary to law, and to prevent the discontinuance of any regular or other public service facility, without first obtaining its authority to do so.
2. Under the statute a railway company may be required by the Public Service Commission to establish and maintain such suitable public facilities and conveniences as may be just and reasonable.
3. A railway crossing which has been in use for many years may rightfully be regarded as a reasonable facility which the Public Service Commission may require the railway company to maintain and continue upon such reasonable terms and conditions as may be prescribed.
4. Where, upon the application of a shipper to the Public Service Commission, and due notice to the railway company, and a full hearing before the commission pursuant to the statute, the commission has ordered the carrier to construct and maintain a railway crossing at a particular point for convenience in the transaction of business between carrier and shipper, the order of the commission will not be reversed here, unless it is beyond the statutory power of the commission, or contrary to some provision of the state or federal constitution, or amounts to an unreasonable and unjust exercise of its power.
5. In such a proceeding the process of the Public Service Commission, with right to be heard before it and to have its orders reviewed here as to all matters involved, satisfies the requirement of due process and other rights protected by the state and federal constitutions.

[fol. 174] *MILLER, Judge:*

Upon the petition of plaintiff for the continuance and maintenance of a grade crossing at McCarr Siding, Mingo County, joined in informally by the county court and numerous other persons more or less interested, and after a full hearing upon the evidence of both parties, the Public Service Commission, finding from the evidence certain facts, ordered that the defendant, Norfolk & Western Railway Company, "do, within thirty days from the date hereof, construct, and thereafter maintain, a reasonably safe and suitable roadway across its tracks at or near the point where said crossing was formerly used by the complainant, as aforesaid; to be not less than eight feet wide, and to be so constructed and maintained as to render the same reasonably safe for the use of vehicles crossing said tracks; subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) The entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) While said crossing is being used by the complainant, as aforesaid, for the transportation of goods across said tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to avert the hazard incident to the use of said crossing for the purposes aforesaid."

A summary of the facts found by the commission, briefly stated, is as follows: (1) That Followay is, and for the past ten years has been, a merchant at Blackberry City, a small village about a mile east of Matewan, on defendant's railway, and opposite McCarr Siding, whose gross sales average from \$4,500.00 to \$5,000.00 per month; that his merchandise is, and for ten years or more has been, shipped and delivered to him at McCarr Siding, in car load and less than car load lots, mostly on the south side of the railway, opposite plaintiff's store located on the north side of the railway, and which he is obliged to transport across the three tracks of defendant at that point, a distance of about two hundred feet; that [fol. 175] the freights paid defendant by him aggregate about \$300.00 per month; (2) That notwithstanding the custom and practice so maintained by the defendant of delivering goods to plaintiff, and notwithstanding the fact that said McCarr Siding is a minor station where some of its trains stop to receive and discharge passengers, and to deliver goods to plaintiff and others, and that he has been allowed for all these years to cross over its tracks at that point with his horses and wagons in hauling his goods from the place of deposit to his store house on the opposite side of the railroad, defendant has within the last twelve months planted heavy posts on its right of way so as to prevent plaintiff from hauling his goods over its tracks; and requiring him at great expense to carry them by

hand: (3) That said McCarr Siding is located on a curve near a deep cut, whereby the view of the crossing by the enginemen operating trains is obstructed except for the distance of about 300 feet on each side of the crossing, because of which the defendant objects to the establishment or continuance of the crossing at that point.

In addition to the facts so found by the commission and established by the evidence, the evidence shows that McCarr Siding is the junction point of the branch line of defendant's railroad to the Alma Thacker Fuel Company's mines and of the Allburn Coal Corporation's side-track, and at or near the opening of a bridge across Tug River, dividing West Virginia from Kentucky, built in 1905 by the Allburn Coal Corporation operating on the Kentucky side, with an upper deck to carry coal cars to its tippie located near the crossing, and a lower deck for wagons and foot passengers, and which, though a private bridge, the coal company for many years has permitted the public to use in crossing from one state to the other, and forming with the crossing and passages on each side a way to the public roads in both states, and which was frequently used by the public, especially in times of high water when the river could not be forded, in handling goods and other merchandise, though the ways at either end of the bridge were not public, but used by the public in getting to the county roads; that there were from twenty-five to forty houses in Blackberry City, and a hundred or more people resided there; that goods were delivered there to the coal companies and to one or two merchants besides plaintiff, and that passengers were received and discharged at that point by defendant in numbers ranging from ten to thirty every day. [fol. 176] The first proposition relied on by defendant's counsel is that the Public Service Commission, being a creature of the statute, was wholly without jurisdiction to make the order complained of. The statute prescribing the duties of public utilities is section 4, chapter 15-o, Barnes' Code 1918, as follows:

"Every person, firm or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances and other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference. \* \* \* Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just. \* \* \* No steam railroad shall discontinue any regular passenger train, or other public service facility, or change any regular passenger train schedule or any time table, without first obtaining authority from the commission so to do."

Section 5 of the same chapter, prescribing the general powers of the Public Service Commission, so far as applicable to this case is as follows:

"The commission is hereby given power to investigate all methods and practices of public service corporations or other persons subject to the provisions of this act; to require them to conform to the laws of this state and to all rules, regulations and orders of the commission not contrary to law. \* \* \* The commission may compel obedience to its lawful orders by proceedings of mandamus or injunction or other proper proceedings in the name of the state in any circuit court having jurisdiction of the parties or of the subject matter, or the supreme court of appeals direct, and such proceedings shall have priority over all pending cases. The commission may change any intra-state rate, charge or toll which is unjust or unreasonable and may prescribe such rate, fare, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism as between persons, localities or classes of freight."

And as to the rights of the petitioner and the public in general, section 11 of said chapter provides:

"Any person, firm, association of persons, public officer, public or private corporation, municipality or county, complaining of anything done or omitted to be done by any public service corporation subject to the provisions of this act, in contravention of the provisions thereof, or any duty owing by it, under the provisions of this act may present to the commission a petition which shall succinctly state all the facts; whereupon a statement of the charges thus made shall be forwarded by the commission to said public service corporation which shall be called upon to satisfy such complaint or to answer the same in writing within a reasonable time to be specified by the commission. \* \* \* If such public service corporation shall not satisfy the complainant within the time specified, or there shall appear to be any reasonable ground to investigate the [fol. 177] complaint, it shall be the duty of the commission to investigate the same in such manner and by such means as it shall deem proper."

It would seem from these provisions of the statute that the commission had ample power and authority to pass and enforce the order in question here, and that the rights of the plaintiff to invoke the aid of the commission in the premises is complete, unless the contentions of counsel for the railway company be well founded, namely: (1) that the crossing ordered is not a suitable facility, or carrier facility, contemplated by the statute; or (2) that the order, having the force of a statute, (a) contravenes the provisions of sections 9 and 10, article 3 of the Constitution of this State, or (b) the fifth and fourteenth amendments of the Federal Constitution, or (c) that it is unconstitutional because unreasonable in requiring the building and maintenance of a dangerous grade crossing.

It will be observed that the commission, by a specific provision of the statute, may require a railway company "to establish and maintain such suitable public facilities and conveniences as may be reasonable and just." Is the crossing ordered comprehended within

the facilities or conveniences described? That a crossing or convenience of some kind, originating many years ago in a farm crossing, has been maintained at McCarr Siding for many years, is shown by the evidence; and that the railway company has really undertaken to destroy or practically discontinue that crossing, such as it is, without the authority of the Public Service Commission, is admitted. If the particular crossing originated in a farm crossing, which section 14, chapter 42 of the Code, required the railway company to build and maintain when constructing its railroad some twenty-five years ago, it may well be doubted whether it could now discontinue it to the detriment and inconvenience of the petitioner; but the question is not necessarily involved, and is not decided. The question before us is, is the crossing ordered the kind of a facility which may be exacted at the hands of the railway company? May not the facility agreed to and continued for so many years for the accommodation of shippers be regarded as reasonable, and the continuance thereof justified? We think so, upon the principle laid down in *State ex rel. v. White Oak Railway Co.* 65 W. Va. 15. As we held in *C. & O. Ry. Co. v. Pub. Serv. Com.*, 75 W. Va. 100, with reference to the duties prescribed by section 8 of said chapter, the commission has authority under the act to require railroads to provide adequate [fol. 178] facilities for the transportation of persons and property on both main and lateral lines.

But it is contended that the crossing required by the order is not such an "adequate or suitable facility" or such a "carrier facility" as the law does or can exact of a railway company. In support of this proposition only two cases are cited and relied on. The first is *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340. This case turned on the fact that the stockyard scales which the railway company was required to provide did not directly pertain to any business between carrier and shipper, but were for the mere convenience of shippers in weighing their stock for their own information. For this reason, as well as for the reason that the order of the railroad commission did not give the railroad company an opportunity to abate any existing discrimination between the particular station and other points where similar scales had been maintained, the judgment below was reversed.

The other case, that of *Missouri Pacific Railway Co. v. Nebraska*, 217 U. S. 196, was mandamus by a grain elevator company to compel the railway company to build at its own expense a side-track over its right of way to the grain elevator of the relator for its special use and convenience regardless of other elevator facilities provided for handling grain at the same point, and without a preliminary hearing, and under penalty of a heavy fine for refusal, as provided by a later statute. The conclusion of the court was that the statute was unconstitutional in its application to the case at hand, because it did not provide indemnity for what it required; but the court reserved the question whether by amendment such statute might not be rendered valid by providing for preliminary hearing and compensation.

The order in question here was made after full hearing, which relieves it from one of the fatal objections in the Nebraska case.



The question of compensation depends on other considerations. In the recent case of *B. & O. R. R. Co. v. Pub. Serv. Com.*, — W. Va. —, 110 S. E. 475, we decided that where an application had been made by a shipper to the Public Service Commission for a side-track, and the railroad company had been served with notice and had had a full hearing, it could not complain of want of notice and an opportunity to be heard; and furthermore that the findings of fact by the Public Service Commission, necessarily based upon evidence, would not be [fol. 179] disturbed upon appeal to this court.

In the case of *Atchison, Topeka and Santa Fe Railway Co. v. State of Oklahoma*, 21 L. R. A. (N. S.) 908, the question was whether the corporation commission had authority to order the institution of and maintenance by the railway company of a telephone in its station house at a certain station where there was but one telephone exchange, for the convenience of the people of another town about six miles away with about three hundred inhabitants, and who received all of their freight by way of that station; and it was held to be such a facility as the commission might reasonably require.

The subject of the expense of installing and maintaining a carrier facility, if it be one which is within the carrier's absolute duties, while one to be considered, is not of controlling importance; but if not falling within the range of absolute duties, the expense becomes a question of more controlling influence. *Oregon Railroad & Nav. Co. v. Fairchild*, 224 U. S. 510, 528-9, and cases cited. In promulgating the order involved here the commission necessarily took into consideration the fact that a facility substantially like the one demanded had existed at the same point for years, and that it related to the business being transacted daily between petitioner and others and the railway company; that the petitioner was required to perform quite burdensome duties and incur considerable expenses in connection therewith; and that the expense to the railroad company, about \$150.00, was small in view of the volume of business done with petitioner and others at McCarr Siding.

We have been referred by counsel for petitioner to a number of decisions reported in the Public Utility Reports, in support of his views as to the lawfulness of the order now under consideration. One of these is *Wadsworth v. Erie Railroad Company*, P. U. R. 1915C, 402, in which the New York commission affirmed its jurisdiction to compel a railroad company to maintain and keep in repair an overhead bridge and approaches, which constituted an established farm crossing, this upon the ground that the statute required railroad companies to build and maintain proper farm crossings. Another case is *Re Clarence Telephone Company*, P. U. R. 1920E, 363, in which the Missouri Public Service Commission held that reasonably adequate service, considering the circumstances of each individual case, should be the first requirement of the commission, [fol. 180] since service is the only thing the utility can give its patrons for the rates paid. This case involved the question whether the rates charged were reasonable considering the inferior service theretofore rendered and the proposed improvements by the tele-



phone company. A third case is that of *Meyers v. Chicago, M. & St. P. Ry. Co.*, P. U. R. 1916F, 778, in which the South Dakota Board of Railroad Commissioners decided that under a statute giving them authority to require any common carrier to install "any facility necessary for the safety, convenience and accommodation of the public," they had jurisdiction to require a railroad company to build a platform for loading and unloading heavy machinery at a particular station, notwithstanding the alternative proposition of the railroad company to build skids adapted only for unloading automobiles. Another case is *Dwyer v. Chicago & Northwestern Ry. Co.*, P. U. R. 1919D, 448, in which the supreme court of South Dakota held that an order of the railway commission requiring a railway company to construct crossings, cattle guards and fences upon the request of the owner of lands on both sides of the railway was not an arbitrary and unreasonable exercise of its power, and was calculated rather to decrease than increase the danger and hazard of the traveling public and the persons operating the trains. In another case, *Northeast Kansas Telephone Company v. Hiawatha Mut. Tele. Company*, P. U. R. 1915A, 1016, the Kansas Public Utilities Commission held that no established service "or practice pertaining to the service" of a public utility could be varied, modified or discontinued without the consent of the commission. Such in effect and substance is the provision of our statute.

Lastly to be considered is the question of the constitutionality of the order complained of. Does the order deprive the railway company of its property without due process, or of the equal protection of the law? Certainly it does not if the service required by the order is reasonably within the absolute duties of the carrier, or unless it amounts to an arbitrary or unreasonable exercise of the powers of the commission. In *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, we decided that the process of the Public Service Commission, with right to be heard before it and to have its orders reviewed here as to all matters involved, satisfied all the requirements of due process and other constitutional rights; and also that the orders of the commission were to be regarded as final unless beyond the power which the commission could constitutionally exercise, or beyond its statutory power, or based upon a mistake of [fol. 181] law. And it was so held also in effect by the Supreme Court of the United States, in *Oregon Railroad & Nav. Co. v. Fairchild*, *Supra*, and in *Minn. & St. Louis Railroad Co. v. Minnesota*, 193 U. S. 53. And a similar holding will be found in *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1.

Our conclusion is to affirm the order of the Public Service Commission.

[fol. 182]

## IN SUPREME COURT OF APPEALS

## ORDER STAYING MANDATE

At another day, to-wit, on the 3rd day of June, 1922, the following order was made and entered:

It is ordered that the operation of the final judgments or decrees entered at this term in appeal cases, not heretofore suspended, since the 2nd day of May, 1922, be and the same hereby are suspended for a period of thirty days from the dates said judgments or decrees were entered, and that in each of the causes in which judgments or decrees were entered in which a petition for rehearing is filed in the office of the Clerk of this Court within said thirty days, the operation of the final judgment or decree is suspended until the further order of this Court, but in all cases in which a petition for rehearing is not so filed within said thirty days, the judgments or decrees of this Court shall become final and be severally certified as heretofore directed.

And it is further ordered that the Clerk may certify the mandate to the lower court in any case decided at this term since the 2nd day of May, 1922, when the parties jointly request in writing that the mandate may be certified.

---

[fol. 183] At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 12th day of September, 1922, the following order was made and entered, to-wit:

## IN SUPREME COURT OF APPEALS

[Title omitted]

## ORDER DENYING REHEARING

The Court, having maturely considered the several petitions for re-argument and rehearing filed in the five foregoing causes, is of opinion to and hereby doth refuse the prayer of said petitions, and doth order that the final judgments or decrees heretofore entered in said causes at a former term of this Court be made absolute and be severally certified as heretofore directed.

---

The petition for re-argument and rehearing aforesaid, filed under a suspension order of this Court entered at the last preceding regular term, is in the words and figures following:

[fol. 183½]

[Title omitted]

[fol. 184] IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 4618

[Title omitted]

Appeal from Order of the Public Service Commission of the State  
of West Virginia

PETITION OF THE NORFOLK AND WESTERN RAILWAY COMPANY FOR  
A RE-HEARING—Filed June 24, 1922

To the Honorable the Judges of the Supreme Court of Appeals of  
West Virginia:

Your petitioner, the Norfolk and Western Railway Company, would respectfully represent that the opinion and judgment of this Court rendered on the 30th day of May, 1922, in the above en- [fol. 185] titled cause should be re-opened and re-heard upon the following questions and for the accompanying reasons:

1. The order of The Public Service Commission of West Virginia, entered on the 11th day of March, 1922, and affirmed upon appeal by this Court by its judgment rendered on the 30th day of May, 1922, commanding the Norfolk and Western Railway Company to construct and maintain a roadway across its tracks at McCarr Station, in the County of Mingo, and State of West Virginia, "subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) The entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) While said crossing is being used by the complainant, as aforesaid, for the transportation of goods across said tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the [fol. 186] use of said crossing for the purposes aforesaid," deprives your petitioner, the Norfolk and Western Railway Company, of its property, without due process of law, and likewise denies your petitioner the equal protection of the laws, all in violation of Section 1 of Article 14 of the Amendments to the Federal Constitution, and.

2. Said order is an unconstitutional interference with and obstruction to interstate commerce, in that it turns over to Followay, a private individual, the possession pro tanto of the right of way and tracks of an interstate carrier by rail of persons and property, and delivers the control and management of its trains to him, while trans-

porting persons and goods in interstate commerce, to the exclusion of the carrier, and in violation of Section 8 of Article 1 of Federal Constitution governing the regulation of commerce among the States.

Your petitioner files herewith a printed memorandum in support hereof, elaborating the reasons therefor, which it prays may be read and considered by the Court, and a re-hearing of this cause be granted.

Theodore W. Reath, Lucian H. Coker, John H. Holt, Counsel  
for Norfolk and Western Railway Company. June 20,  
1922.

[fol. 187] *Brief in Support of the Foregoing Petition*

# I

## The Order of the Commission Violates Section 1 of the 14th Amendment to the Federal Constitution

The roadway ordered across the tracks of the Railway Company is private. This appears upon the face of the order of the Commission itself. It connects at neither end with a public highway, and, presumably, does not even traverse the right of way after leaving the Railway Company's tracks. It begins within the right of way and ends within the same, and could be of no advantage even to Followway, unless it carries by implication the right to Followway to enter upon the right of way at any time or place for the purpose of reaching the crossing. Its use is not granted to the public, but is confined to Followway and other shippers by the Railway in removing their goods to the north side of the track. Neither he nor they may use the same for the purpose of shipping goods by rail from McCarr siding to other points. It may not be used by foot passengers or teams for any other purpose, it is closed to the public, and Followway is not only authorized but directed to close the entrance to such crossing on the north side by a gate to be constructed and maintained [fol. 188] by himself, and to be kept closed and locked by him, except when the crossing is being used for the limited purposes aforesaid. Followway is given the right to enter upon the Company's property and build a fence along its right of way, or through its right of way, and to construct and maintain a gate therein, which he is compelled to keep closed and locked except when the same is in use for the transportation by him, or some other shipper, to the north side of the track of goods consigned to him or them. The public is locked out, and the Railway Company is locked in, and it is deprived of the free and unobstructed use of its tracks and right of way, not for the public's benefit, but for the enhancement of a private mercantile enterprise. Followway is authorized, for the purpose of constructing and maintaining his fence and gate, to enter upon and take possession of the private property of the Railway Company without compensation, and for a private purpose. Even if the purpose were public, the taking could not be without compensation, but, being private, cannot be permitted even with com-

pensation, and is violative of the 14th Amendment, because it deprives the Railway Company of its property without due process of law. The 14th Amendment and the State Constitution are alike violated by any act that either takes private property for a private [fol. 189] purpose, with or without just compensation; or private property even for a public purpose, in the absence of such compensation.

West Virginia Constitution, Article 3, Section 9;  
Varner vs. Martin, 21 W. Va., 534.

A former distinguished member of this Court, now dead, stated the doctrine here thought to be involved in the following language:

"Private property is sacred. It cannot be taken from one man for the mere private use of another, even with full compensation. The purpose of its condemnation must be public, either for the use of the state or some of its counties or municipalities performing, in part, the functions of a state, or for the use of some corporation chartered by the state for the performance of functions deemed public, for transportation or other public benefit. Condemnation for such public purposes must be with compensation. If the condemnation is for any other than such public purpose, and is merely for the private use or convenience of another man, it is a gross violation of the Fourteenth Amendment, as also of the state constitutions. The state constitutions declare that private property shall not be taken, even for public use, without compensation, thus denying, by the strongest implication, the right to take it for private use even with compensation. Hence, an act allowing taking of land for a private road is unconstitutional."

The Fourteenth Amendment, Brannon, Page 163.

In *Norwood vs. Baker*, 172 U. S. 269, a special assessment upon abutting property by front foot without taking special benefits into account for the entire cost and expense of opening a street was held a taking of private property for public use without compensation.

A suggestive case both in the circumstances disclosed and upon principal is *State of Washington Ex Rel. Oregon R. R. & Nav. Co. vs. Railroad Commissioners of Washington*, 224 U. S. 510. There a State Railroad Commission had ordered two trunk line railroads to construct and operate a track connection between them for the interchange of business. This order was attacked by the Railroads as not due process of law, the evidence being insufficient to prove that the existing service was inadequate and that the freight would be offered in the future to move by the proposed track connections. The Supreme Court of the State of Washington upheld the Commission's order and on error to the Supreme Court of the United States judgment — reversed, the court saying (pages 524-5):

[fol. 191] "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

This application of the Fourteenth Amendment to the case at bar was presented by the third assignment of error and in argument but was not dealt with in the syllabus and opinion of this court. Hence we are presenting the matter to the court by the present petition to rehear in the belief that the point in some way escaped notice in affirming the judgment.

## II

### The Order of the Commission is Unconstitutional as an Unreasonable Interference with Interstate Commerce

The Norfolk and Western Railway Company is an interstate carrier of persons and property, owning and operating a main line of railroad extending from the City of Norfolk, across the State of Virginia, through the State of West Virginia, and into the State of Ohio at the City of Columbus, together with various branch lines extending [fol. 192] into other states; and the private roadway here complained of traverses the tracks of the main line at McCarr siding, in Mingo County, West Virginia. Tremendous coal trains move over this main line from the Pocahontas coal field in the State of West Virginia into the State of Ohio to the cities of Columbus and Cincinnati. Frequently such trains are more than a half mile in length, and move at a speed of twenty miles per hour. Likewise passenger trains, with a speed of forty miles per hour, some going East, and some West, over this same main line, are compelled to cross the roadway in question. Neither the passenger nor the freight trains could by any possibility be stopped (whether going East or West) within the distance wherein the roadway first comes into view. This is in consequence of cuts and curvatures; and the roadway becomes a serious menace to life and property. The very highest skill of railway officials and employes cannot avert disaster at such a crossing without impeding the timely delivery of passengers and freight in interstate commerce. Disaster can only be avoided by stopping these trains, whether East or West bound, at or near the crossing, thus impeding and unreasonably interfering with interstate commerce. The order will compel all these trains to stop, whether passenger, mail or freight, and such a requirement, it is respectfully submitted, is an [fol. 193] unconstitutional interference with, and obstruction to, interstate commerce.

The principle here invoked is comparable with that declared by the Court in *H. & T. C. R. Co. vs. Mayes*, 201 U. S. 321. A Texas Statute penalized a failure of a railway company to furnish cars to a shipper within a certain number of days under requisition, and admitted of no excuse except "strikes and other public calamity." The Court held this Statute unconstitutional as an unreasonable restraint upon interstate commerce because the Statute did not make "sufficient allowance" for the "practical difficulties," and accordingly transcended "the legitimate powers of the Legislature."

And see

*Illinois Central Railway Co. vs. Illinois*, 163 U. S. 142.

And

*Cleveland C. C. & St. L. R. Co. vs. Illinois*, 177 U. S. 514.

And, when we come to a further examination of the Commission's order, we find that it takes out of the hands of the interstate carrier the control and management of its trains. Followay is directed, while said crossing is being used, to send a watchman upon the tracks [fol. 194] of the Railway Company for the purpose of lessening the hazard incident to the use of the crossing. This gives him the power, by signal, to stop and hold trains, start them again, and control their movements. The operation of its trains is thus taken out of the hands of the Company, and the movement and protection of interstate commerce transferred, and the United States mails turned over to a person not responsible to this Railway Company, with the power to impede and harass or neglect the same at his will and pleasure.

Again this phase of unreasonable interference with interstate commerce in forcing a dangerous grade crossing upon the Railway Company was presented (fourth assignment of error) to the Court but not passed upon as a federal question in the syllabus and opinion filed in this court, May 30, 1922.

Respectfully submitted, Theodore W. Reath, Lucian H. Coker, John H. Holt, Counsel for Norfolk and Western Railway Company. June 20, 1922.

[fol. 195] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1922

[Title omitted]

#### PETITION FOR WRIT OF ERROR

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Norfolk & Western Railway Company, respectfully represents:

That it is aggrieved by a judgment entered against it by the Supreme Court of Appeals of West Virginia on May 30, 1922, in a certain case then therein pending wherein your petitioner was appellant, or plaintiff in error, and The Public Service Commission of West Virginia was appellee, or defendant in error, which said judgment was re-affirmed on petition of Norfolk & Western Railway Company for a rehearing on the 12th day of September, 1922, and, under the rules of the court entering the same, became final on said last named date.

That the judgment aforesaid of the Supreme Court of Appeals of West Virginia has become and is the judgment of the highest court in said State in which said cause could be heard and determined, and the record of said judgment and of the proceedings in said cause is still in the said Supreme Court of Appeals of West Virginia: [fol. 196] That the said final judgment of the Supreme Court of Appeals of West Virginia and as re-affirmed on petition for rehearing was entered in a cause wherein was drawn in question the validity of an order dated March 11, 1922, of the Public Service

Commission of West Virginia on the ground that said order is repugnant to Article Fourteenth of the Amendments of the Constitution of the United States, and said judgment is in favor of the validity of the said order; and also directly involves the constitutionality of the said order because the same interferes with and imposes burdens and restrictions upon the interstate commerce transacted by this petitioner in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8, Paragraph 3; and that the said judgment is against the constitutional right claimed by his petitioner and is contrary to the Constitution of the United States; all of which will more fully appear in detail from the assignment of errors presented herewith and filed herein.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Appeals of the State of West Virginia to the end that the record in said matter may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed. And your petitioner will ever pray.

John H. Holt, Lucian H. Cocke, Theodore W. Reath,  
Attorneys for Norfolk & Western Railway Company, Petitioner. November —, 1922.

---

[fol. 197] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1922

[Title omitted]

#### ASSIGNMENT OF ERRORS

Now comes the said Norfolk & Western Railway Company, plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Appeals of the State of West Virginia in the above entitled matter there is manifest error in this to-wit:

First. The judgment of the Supreme Court of Appeals of West Virginia entered on May 30, 1922, (rehearing denied September 12, 1922) affirming an order of the Public Service Commission of West Virginia, made the 11th day of March, 1922, commanding Norfolk & Western Railway Company to construct and maintain a roadway across its tracks at McCarr Station, in the County of Mingo, and State of West Virginia, "subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid: (b) The entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be con-



structed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) While said crossing is being used by the complainant, as aforesaid, for the transportation of goods across said [fol. 198] tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing for the purposes aforesaid", deprives your petitioner, the Norfolk & Western Railway Company, of its property, without due process of law, and likewise denies your petitioner the equal protection of the laws, all in violation of Section 1 of Article 14 of the Amendments to the Federal Constitution; and

Second. Said judgment effects an unconstitutional interference with and obstruction to interstate commerce, in that it turns over to Followay, the complainant before the Public Service Commission of West Virginia, and a private individual, the possession pro tanto of the right of way and tracks of an interstate carrier by rail of persons and property, and delivers the control and management of its trains to him, while transporting persons and goods in interstate commerce, to the exclusion of the carrier, and in violation of Section 8 of Article 1 of the Federal Constitution governing the regulation of commerce among the States.

John H. Holt, Lucian H. Cocke, Theodore W. Reath  
Counsel for Plaintiff in Error. November —, 1922.

---

[fols. 199-201] IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1922

[Title omitted]

BOND ON WRIT OF ERROR—[For \$2,500.00; Approved by Mr. Chief Justice Taft; Omitted in Printing]

---

[fol. 202] WRIT OF ERROR—Filed Dec. 20, 1922

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals, before you, or some of you, being the highest court of or equity of the said State in which a decision could be had in

said suit between Norfolk and Western Railway Company, appellant, and The Public Service Commission of West Virginia et al., appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, [fol. 203] or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Norfolk & Western Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the ninth day of December, in the year of our Lord one thousand nine hundred and twenty-two.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Allowed by Wm. H. Taft, Chief Justice of the United States.

[fol. 204]

#### CITATION AND SERVICE

UNITED STATES OF AMERICA, ss:

To the Public Service Commission of West Virginia et al., Greeting:

You are, hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia, wherein Norfolk and Western Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this ninth day of December, in the year of our Lord one thousand nine hundred and twenty-two.

Wm. H. Taft, Chief Justice of the United States.

[fol. 205] Williamson, West Virginia, December 23, 1922.

Service of the within citation is accepted this 23rd day of December, 1922, for John Followay, one of the defendants in error in the suit therein named.

By Randolph Bias, His Counsel.

Charleston, West Virginia, December 23, 1922.

Service of the within citation is accepted this 23rd day of December, 1922, for the Public Service Commission of West Virginia, one of the defendants in error therein named.

By R. B. Bernheim, Secretary Public Service Commission of West Virginia.

[fol. 206] IN SUPREME COURT OF APPEALS

CLERK'S CERTIFICATE

STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Supreme Court of Appeals, and do further certify that the papers, evidence, documents and records, together with the statements of the reasons for the entry of the order of the Public Service Commission, are the same that have been certified to my said office by the Secretary of the Public Service Commission of the State of West Virginia, and which transcript of the record as aforesaid is *comprised* of pages numbered from 1 to 206, inclusive.

In testimony whereof, I hereto set my hand and affix the seal of the said Supreme Court of Appeals of West Virginia, at Charleston, Kanawha County, this 30th day of December, 1922, and in the 60th year of the State.

Wm. B. Mathews, Clerk Supreme Court of Appeals. (Seal of Supreme Court of Appeals, West Virginia.)

Endorsed on cover: File No. 29,329. West Virginia Supreme Court of Appeals. Term No. 187. Norfolk & Western Railway Company, plaintiff in error, vs. The Public Service Commission of West Virginia et al. Filed January 4th, 1923. File No. 29,329.

JAN 16 1924

WM. R. STANLEY  
CLERK

No. 187

OCTOBER TERM 1923

---

IN THE  
**Supreme Court of The United States**

---

NORFOLK & WESTERN RAILWAY COM-  
PANY,

Plaintiff in Error.

vs.

PUBLIC SERVICE COMMISSION OF WEST  
VIRGINIA ET AL.

Defendants in Error.

---

IN ERROR TO THE SUPREME COURT OF  
APPEALS OF THE STATE OF WEST  
VIRGINIA

---

BRIEF FOR JOHN FOLLOWAY.  
ONE OF DEFENDANTS IN ERROR.

---

RANDOLPH BIAS,  
LAFE CHAFIN  
Counsel for  
John Followay.

DECEMBER 20, 1923.

---



## INDEX

	Page
I. STATEMENT OF THE CASE.....	1
II. POINTS OF LAW RELIED ON TO SUPPORT JUDGMENT OF WEST VIRGINIA COURT.....	8
III. ARGUMENT (begins) .....	10

### INDEX OF CASES CITED

CASE	Report	Page	Page of Brief
Atl. Coast Line vs. N. C. Corp. Comm.	(206 U. S. 1) (51 Law Ed. 933)		9, 22
C. B. & Q. vs. Railroad Commission	(237 U. S. 220) (59 Law Ed. 926)		23
C. B. & Q. vs. Illinois	(200 U. S. 560) (50 Law Ed. 596)		8
C.C.C. & St. L. RR. CO. vs. Illinois	(177 U. S. 514) (44 Law Ed. 868)		9
Detroit, Ft. Wayne & Belle Isle vs. Osborne	(189 U. S. 383) (47 Law Ed. 860)		9
Erie RR. Co. vs. Bd. of Publ. Utility Comm.	(254 U. S. 393) (65 Law Ed. 322)		22
Kennard vs. State of La.	(92 U. S. 480) (23 Law Ed. 478)		9
Lake Shore & M. S. RR. Co. vs. Ohio	(173 U. S. 285) (43 Law Ed. 702)		8
L. & N. RR. Co. vs. Garrett	(231 U. S. 298) (58 Law Ed. 229)		8

CASE	Report	Page	Page of Brief
Minn. & St. L. RR. Co. vs. State of Minn.	(193 U. S. 52) (48 Law Ed. 614)		9, 19
Miss. RR. Comm. vs. M. & O. RR. Co.	(244 U. S. 388) (61 Law Ed. 1216)		8, 13
Miss. RR. Comm. vs. Ill. Central	(203 U. S. 335) (51 Law Ed. 209)		8
N. Y. & N. Eng. RR. Co. vs. Bristol	(151 U. S. 556) (38 Law Ed. 269)		19
Prentiss vs. Atl. Coast Line	(211 U. S. 210) (53 Law Ed. 150)		8
Wis. Minn. & Pac. RR. Co. vs. Jacobson	(194 U. S. 296) (45 Law Ed. 194)		9, 16, 18

---

IN THE

---

**Supreme Court of The United States**

---

NORFOLK & WESTERN RAILWAY COM-  
PANY,

Plaintiff in Error.

vs.

PUBLIC SERVICE COMMISSION OF WEST  
VIRGINIA ET AL.

Defendants in Error.

---

IN ERROR TO THE SUPREME COURT OF  
APPEALS OF THE STATE OF WEST  
VIRGINIA

---

BRIEF FOR JOHN FOLLOWAY.  
ONE OF DEFENDANTS IN ERROR.

---

STATEMENT OF THE CASE.

The statement of the case as made by counsel for plaintiff in error is in part correct, but is incorrect in that we feel it fails to give to the court a complete understanding of the facts involved. In order that the court may have in the first instance a cor-



rect understanding of these facts this further statement of the case is made.

McCarr Siding is a regular stop or station for freight purposes and a flag stop for passenger service on the Norfolk & Western Railroad at the town or village of Blackberry City, approximately one and one-half miles east of the town of Matewan (having a population of approximately one thousand), in Mingo County, West Virginia. (R. 32). It has been such station of the railway company for fifteen years or more prior to the institution of this suit. (R. 32.)

For ten years before the institution of the suit John Followay, one of the defendants in error, was the owner and he still is the owner of a retail store located at this siding in the village of Blackberry City. During the whole of the time since his store was established there and until the matters complained of in this action, freight has been unloaded by the railroad company at this station for his use and for the use of the others to whom freight was consigned and who desired to unload at this station, whether such consignments were made in car loads or less than car loads (R. 32, 33, 34). No station house or other structure was placed or kept here by the railroad company in which to house or shelter matter shipped by freight, but such goods were unloaded at this point on the ground by the side of the tracks and on the right of way of the railroad company. Such merchandise as was carried to the station by the

railroad company from West of McCarr was unloaded on the South side of the tracks next to Tug River, a narrow stream separating the state of West Virginia from the state of Kentucky at this point. Such freight as was brought by the railroad company from the East to McCarr Siding was usually unloaded on the North side of the tracks at this point next to the hills, which hills come close to the tracks of the railroad company. The station point is on a curve in the tracks of the railroad and because of the curve the enginemen on trains would see the track, at the place where the crossing in question has been, for a distance of four hundred and eighty feet when coming from the east and for from three hundred and twenty feet to six hundred and seventy feet when coming from the west (R. 15).

Blackberry City, which lies south of the tracks, is a village of approximately one hundred people (R. 86), and the station at this point serves for freight and passenger purposes approximately one thousand people living here and in this vicinity on both the West Virginia and Kentucky side of Tug River (R. 75). On the average approximately twenty people daily get on and off passenger trains at this point (R. 47). From the place where freight for the years as aforesaid has been unloaded it is approximately one hundred and eight feet to the end of the bridge which spans Tug River connecting Blackberry City and McCarr Station with the Kentucky side of the river, on which side of the river are located two coal mining plants (R. 17). Blackberry City is laid out with streets and avenues, which streets and avenues reach to the right of way

of the Norfolk & Western Railroad (Map filed by Hicks, a witness for defendant in error, found at page 30 and 31 of Record.) Mingo Street, as shown on this map, is a main state or county highway leading north and south through Mingo County and through the village of Blackberry City. This is approximately five hundred feet from the railroad crossing involved in this action (R. 17). On the opposite side of Tug River in the state of Kentucky are the public roads of that state, reaching near to the end of the bridge in question. This bridge is privately owned by the Allburn Coal Company, operating on the Kentucky side opposite Blackberry City. It is what is known as a double-decker bridge, the lower level or deck being at the level of the earth on either side of the river and being employed and used by pedestrians and vehicles generally. The upper level or deck is a railroad bridge over and across which coal cars are moved on rails from the Kentucky side of the river to the Norfolk & Western Railway Company on the West Virginia side, where the coal is loaded into railroad cars for shipment (R. 17).

For fifteen years or more a crossing leading from the one side of the tracks of the railroad company to the other was maintained and used at this place (R. 32). Over this crossing the public generally passed, including those leaving the public road in Mingo County and crossing over the bridge described to the public roads in the state of Kentucky, and as well those who received freight at this station brought there by the railroad company, and passen-

gers getting on and off the trains of the railroad company at this point (R. 35). Followay, the merchant, who is defendant in error here, at times used the crossing as often as fifteen times a day, and other persons frequently used it daily (R. 36). No complaint was made, no objections raised by the railroad company or by anyone for it, until a short time before this action was instituted before the Public Service Commission of West Virginia.

Shortly before the institution of this action the railroad company for some purpose best known to it, saw fit to destroy and prevent the use of the crossing for vehicles by placing heavy timbers or posts on the north side of the tracks on its right of way of such size and in such way as to render it impossible for vehicles to cross the tracks. These were placed there for the express purpose of preventing vehicles from crossing the tracks for any purpose (R. 35).

While the bridge was privately owned it was used generally and freely by the public without objection from the owners of the bridge (R. 39).

As a result of the placing here of the timbers by the railroad company the complainant Followay, defendant in error here, found it impossible to move his merchandise from the South side of the tracks, where nearly all of it was unloaded by the railroad company, to his store on the north side of the tracks, approximately one hundred feet away. Therefore, in order to get this freight, of whatever character and in whatever form or bulk, from the place it was

unloaded, when coming from the west, as most of it did and does come, Followay must carry the merchandise and freight across the four tracks of the railroad company for a distance of from one hundred to two hundred feet, involving much trouble, expense and danger.

Followay had gross sales of approximately five thousand dollars a month and on the average paid as freight charges to the railroad company approximately three hundred dollars a month (R. 85).

The only other way in which Followay can get his goods to his store is by having them sent to the town of Matewan, about one and half miles from his store, and from there have it hauled by wagon to the store. To do this entails an additional expense to him of approximately two hundred dollars the month (R. 40).

The reason assigned by the railroad company for closing and preventing the use of the crossing at this point was the danger to those using the crossing and employes and passengers upon trains of the railroad company because of the use of the crossing. This in spite of the fact that a crossing of any character would be safer and better than conditions that now exist because of the closing of the crossing by the railroad company, as admitted by Mr. Franklin, the superintendent of the railroad company (R. 79).

It developed at the hearing before the Commission that an expense of approximately one hundred

and fifty dollars was all that would be required of the railroad company to install and restore the crossing at this place (R. 89).

Having been denied the use of the crossing and the facilities for handling and moving his merchandise at the crossing by this action of the railroad company, Followay brought his complaint before the Commission, which resulted in the finding by the Commission complained of by the railroad company, first in the Supreme Court of Appeals of West Virginia and now in this court—the West Virginia court having affirmed the action of the Commission in requiring the railroad company to restore the crossing. The Commission found, and the West Virginia court affirmed the finding, that a crossing or convenience of some sort had been maintained at this point for many years and that the action of the railroad company in closing it was to destroy and practically discontinue the crossing and that such action was in violation of the statute of West Virginia (Chap. 15-0, Sec. 4), and was without authority of the Public Service Commission of West Virginia. In addition to the inconvenience and increased expense to the complainant Followay, defendant in error, the discontinuance of the crossing causes great inconvenience and hardship to approximately one thousand other persons who have, and have had occasion to use this crossing (R. 48, R. 75).

## II

### POINTS OF LAW RELIED UPON TO SUPPORT THE JUDGMENT OF THE WEST VIRGINIA COURT.

“A state may regulate the conduct of railroads within its borders, either directly or through a body charged with the duty, and invested with the powers requisite to accomplish such regulation.”

MISS RR. COMMISSION VS. M. & O.  
RR. CO., 244 U. S. 388 (61 Law Ed.  
1216)

MISS. RR. COMMISSION VS. ILL. CEN.  
RR. CO., 203 U. S. 335 (51 Law Ed.  
209)

PRENTISS VS. ATLAN. COAST LINE,  
211 U. S. 210 (53 Law Ed. 150)

L. & N. RR. CO. VS. GARRETT, 231 U.  
S. 298 (58 Law Ed. 229)

Under this power of regulation a state may require carriers to provide reasonable and adequate facilities to serve not only the local necessities, but the local convenience of the communities to which they are directly tributary.

C. B. & Q. VS. ILL., 200 U. S. 560 (50 Law  
Ed. 596)

MISS. RR. COMMISSION VS. M. & O.  
RR. CO., 244 U. S. 388 (61 Law Ed.  
1216)

LAKE SHORE & M. S. RR. CO. VS.  
OHIO, 173 U. S. 285 (43 Law Ed.  
702)

C. C. C. & ST. L. RR. CO. VS. ILL., 177  
U. S. 514 (44 Law Ed. 868)

ATL. COAST LINE VS. N. C. CORPORA-  
TION COMM., 206 U. S. 1 (51 Law  
Ed. 933)

The finding of fact in this case made by the  
Public Service Commission and made by the highest  
West Virginia court is decisive of the case and a  
finding of fact so made is conclusive on this court.

MINN. & ST. L. RR. CO. VS. STATE OF  
MINN., 193 U. S. 52 (48 Law Ed.  
614)

The fourteenth amendment to the Federal Con-  
stitution is not available to the railroad company  
here because the action of the Commission and of  
the West Virginia court complained of is one taken  
in the proper exercise of the police power of the  
state.

DETROIT, FT. WAYNE & BELLE ISLE  
VS. OSBORNE, 189 U. S. 383 (47  
Law Ed. 860)

KENNARD VS. ST. OF LA., 92 U. S. 480  
(23 Law Ed. 478)

WIS. MINN. & PAC. RR. CO. VS. JA-  
COBSON, 194 U. S. 286 (45 Law Ed.  
194)

MINN. & ST. L. RY. CO. VS. STATE OF  
MINN., 193 U. S. 51 (48 Law Ed.  
614)



### III.

## ARGUMENT

The action of the Public Service Commission of West Virginia, affirmed by the Supreme Court of Appeals of West Virginia, complained of here by the plaintiff in error, was taken pursuant to the statute of West Virginia, Section 4, Chap. 15-0 of Barnes' Code of 1918. This section reads in part:

“Every person, firm or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances and other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and safety and comfort of its employes, and in all respects just and fair and without any unjust discrimination or preferences. \* \* \*  
*No steam railroad shall discontinue any regular passenger train, or other public service facilities or change any regular passenger train schedule or any time table, without first obtaining authority from the Commission so to do.*”

Section 5 of the same chapter of the West Virginia Code prescribes the powers of the Commission and fixes rules for its regulation. Section 11 thereof tells us who can complain of things done or omitted to be done by such public service corporations and how the complaint shall be made and heard.

For more than ten years Followay, the merchant who made the complaint to the Commission, had conducted his retail store at McCarr Siding. For more than fifteen years the crossing, the destruction of which was the basis of his complaint, had been maintained and used at this station.

Alleging that the crossing was a dangerous one to those using it and to employees and those riding on its trains, the railroad company, shortly before complaint was made, destroyed the crossing by going to one side of its tracks and at the crossing and placing in the ground there heavy posts and timbers about five feet apart and for a distance of about fifty feet paralleling the tracks, which was done for the express purpose of preventing vehicles from using the crossing and passing from one side of the railroad tracks to the other side of the tracks (R. 35). This made it impossible for Followay and others who complained with him to cross the tracks with vehicles at this point. Therefore, in order to transport the merchandise consigned to him from the place where the same was unloaded or left by the railroad company, Followay must carry by hand this merchandise across the four tracks of the railroad company at this station.

He made complaint in form required by statute. The matter was heard by the Public Service Commission of the state. The order entered upon this hearing by the Commission and its finding of facts is found at page 80 of the printed record. From this finding of fact we learn: (a) That the

volume of business transacted by Followay was about \$5,000 per month; (b) That most of his goods came from the west and were unloaded by the railroad company on the ground on the south side of the track opposite his store, which is on the north side; (c) That for a number of years he had hauled his goods across these tracks to his store; (d) That within twelve months before the finding by the Commission the railroad company prevented him from hauling the goods across the tracks by planting posts on approximately five feet centers for a distance of about fifty feet along its right of way on the north side of the tracks so as to obstruct the use of the track by the public and effectually prevent the use of vehicles; (e) That by reason of this he was compelled to carry his goods by hand at an expense greatly in excess of that required to transfer the goods by hauling; (f) That no provision was made by the railroad company to protect the goods from the weather; (g) That he was seriously damaged by exposure to the weather of his goods before they could be removed to his store; (h) That he paid the railroad company approximately \$300.00 a month for freight.

The opinion of the Supreme Court of Appeals of West Virginia, found at page 84 of the printed record, affirmed the action of the Commission and the finding of fact by the Commission and in addition thereto found the following facts:

The evidence shows that McCarr Siding is the junction point of the branch line of defendant's railroad to the Alma Thacker

Fuel Company mines and of the Allburn Coal Corporation side track, and at or near the opening of a bridge across Tug River, dividing West Virginia from Kentucky, built in 1905 by the Allburn Coal Corporation operating on the Kentucky side, with an upper deck to carry coal cars to its tipple located near the crossing, and a lower deck for wagons and foot passengers, and has permitted the public to use in crossing from one state to the other, and forming with the crossing and passages on each side a way to the public roads in both states, and which was frequently used by the public, especially in times of high water when the river could not be forded, in handling goods and other merchandise, though the ways at either end of the bridge were not public, but used by the public in getting to the county roads; that there were from twenty-five to forty houses in Blackberry City, and a hundred or more people resided there; that goods were delivered there to the coal companies and to one or two merchants besides plaintiff; and that passengers were received and discharged at that point by defendant in numbers ranging from ten to thirty every day."

We maintain that the statute of West Virginia is constitutional and that the action of the Commission, affirmed by the West Virginia court does not deny the railroad company the equal protection of the law nor does it take from it its property without due process of law.

This Court said in *Miss. Railroad Commission vs. M. & O. Railway Co.*, 244 U. S. 388 (61 Law Ed. 1216):

"A state may regulate the conduct of railroads within its borders, either directly or through a body charged with the duty, and invested with the powers requisite to accomplish such regulation."

And in the same case said:

"Under this power of regulation a state may require carriers to provide reasonable and adequate facilities to serve not only the local necessities but the local conveniences of the communities to which they are directly tributary."

This being true, there can be no doubt of the power and right of the state to act through the Public Service Commission, nor can there be doubt of the right of that Commission to require carriers to provide reasonable and adequate facilities to serve not only necessities but local conveniences. The West Virginia statute under which the Commission acted requires the railroad companies to establish and maintain adequate and suitable facilities and denies to the railroad the right to discontinue any public service facility without first obtaining authority from that Commission so to do. (Barnes' Code of West Virginia, 1918, Sec. 4, Chap. 15-0.)

Therefore, when the railroad company, without any request for permission from the Commission so to do, destroyed and rendered useless this crossing by arbitrarily planting heavy posts or timbers at the edge of its right of way of such character and size and such distance apart as to render it impossible for vehicles to cross its tracks at a crossing

which had been there and been used by Followay and the public generally for many years, the railway company plainly violated this provision of the West Virginia statute, and when the Commission by its order commanded and directed the railway company to restore this facility by constructing and permitting use of the crossing it was proceeding in a lawful way under constitutional law and its order did not and does not deprive the railroad company of its property without due process nor does the order deny the railroad company the equal protection of the law given it by the fourteenth amendment to the Federal constitution.

A railroad company is given great powers by its charter. It is a public service corporation. It has the power of eminent domain. Its lines of track are public highways. It enjoys privileges and immunities denied to the average citizen. Because of these facts it owes certain duties to the public and to its shippers. One of these duties is to furnish reasonable facilities and conveniences.

A reasonable facility and convenience is a crossing for vehicles at a station where freight and passengers are unloaded and taken on board its trains.

For many years at McCarr Siding such crossing was available to the public. For ten years Followay operated his store there. He received his freight at this station, nearly all of which was placed on the ground by the railroad company on its right of way across four tracks opposite from his store.

No station house was furnished; no shelter was provided for the merchandise, but it was left and exposed to the weather until such time as he could and did remove it to his store. This merchandise for ten years was transported across these tracks at the crossing and by vehicle, as a rule. But the railroad company, after a long period of years, finding, or professing to find, that the crossing was dangerous, saw fit to destroy it. Its destruction and rendering it unfit for use made it necessary for Followay to carry by hand his freight and merchandise, no matter how heavy, how bulky, or what its character, across these tracks, a distance of 100 ft. or more to his store. Or, if he preferred, he might haul it from the nearest railroad station, about one and a half miles away, which haul means to him a cost of not less than \$200.00 per month more than the handling of the freight would mean if the crossing he had enjoyed were still available to him.

This action so taken by the railroad company violated both the letter and the spirit of the West Virginia statute. The statute not only requires reasonable facilities but definitely prohibits the abandonment or discontinuance of facilities theretofore existing. If there had been no crossing here in the past the Commission of West Virginia by its constitutional law was empowered to require the construction and maintenance of such crossing. But the crossing was here. The railroad company in violation of the law destroyed it.

This Court said in *Wis. Minn. & Pac. R. R. Co. vs. Jacobson*, 179 U. S. 286 (45 Law Ed. 194):

"Railroad companies are not deprived of property without due process of law by a decision compelling them to furnish track connections where the roads intersect, when this is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public and does not, regard being had to the facts, unduly, unfairly or improperly affect the pecuniary rights or interests of the railroad companies, notwithstanding the fact that they may be required to exercise the power of eminent domain and incur a comparatively small expense."

This court therefore has compelled railroad companies to make track connections with other railroad companies and to do so when it became necessary to exercise the power of eminent domain to carry out the order of the court and incur expense by reason thereof.

Here there is no necessity for the exercise of the power of eminent domain; the only thing required is for the railroad company to restore and permit to be used the crossing of its tracks and on its right of way enjoyed for years by the complainant, by shippers generally and by the public. The only expense which will be incurred by the railroad company in carrying out the order of the Commission, according to Superintendent Franklin, of the railroad company, is from \$100.00 to \$150.00 (R. 78). When this is compared with the \$300.00 per month as freight charges paid to it by the complainant Followay, and the \$200.00 per month additional



expense incurred by him by reason of the closing of the crossing, certainly the expense to the railroad company is unimportant, by comparison.

A complaint is made by counsel for the railroad company, the plaintiff in error, that the order of the Commission complained of here amounts to an interference with Interstate Commerce, and that such interference is denied to state authorities.

In *Wis. Minn. & Pac. R. R. Co. vs. Jacobson*, supra, Mr. Justice Peckham, speaking for this court, said:

"The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which this judgment is found. Whether any other portion of the statute does regulate such commerce is beside the question and it is not necessary to here decide. To provide at the place of intersection of these two railroads at Hanley Falls ample facilities for track connections for transferring any and all cars used in the regular business of the respective lines or load from the lines or tracks of one of the said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the transfer of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of property in cars to and from their respective lines, as provided for by this judgment would plainly afford facilities to interstate commerce, if there

were any, and would in no wise regulate such commerce within the meaning of the constitution."

So in the case we now consider. The construction and maintenance of this vehicular crossing over the tracks of the railroad company in no wise interferes with interstate commerce, but, in truth and in fact, affords a reasonable and necessary facility for such commerce and the order requiring the construction and maintenance of such crossing, to the contrary of interfering with interstate commerce really promotes such commerce and affords reasonable and necessary facilities therefor.

We have seen that this court is bound by the finding of fact by the highest court of the state. (Minn. & St. L. R. R. Co. vs. State of Minn., 193 U. S. 51, 48 Law Ed. 614.) We have likewise seen that the Public Service Commission, affirmed by the Supreme Court of Appeals of West Virginia, found certain facts, to-wit: That the crossing had existed for years; that it was a reasonable and necessary facility; that its destruction was a violation of the statute of West Virginia and that to restore and maintain it entails a very small cost upon the railroad company. Therefore, the railroad company here complains of action taken in lawful way under constitutional law by state authorities. This court will hardly accord to the plaintiff in error the relief it seeks since plainly it is entitled to no relief.

In N. Y. & N. Eng. R. R. Co. vs. The Town of Bristol, reported in 151 U. S. 556 (38 Law Ed. 269), this court said:

“The adjudication of the highest court of a state that a law enacted in the exercise of the police powers of the state to protect the public from danger is valid, will not be reversed by this court, on the ground of an infraction of the constitution of the United States.”

And in that opinion Chief Justice Fuller, quoting from an opinion by Mr. Justice Miller, said:

“The fourteenth amendment cannot be availed of as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation upon which such a decision may be founded.”

This opinion further says:

“It is hardly necessary to say that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for affairs of that character is to be sought from state legislatures.”

The court here said that if the railroad company finds irksome or burdensome the West Virginia statute complained of, it cannot expect redress or relief from this court but must seek these at the hands of the West Virginia legislature. The law is not irksome nor unduly burdensome. It is a fair statement and protection of the rights of the public. It asks nothing from the railroad company not rea-

sonable and fair. But even though it should be found unreasonable or unfair or burdensome, the relief for the railroad company must be by legislation and not from the judiciary because beyond all question the statute is valid and constitutional. Further in the opinion last above quoted from, this court said:

“The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligations of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such

particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

Thus we see the plaintiff in error is the subject of legislative control; that the state can exercise this control through its Public Service Commission; that there is no denial of the equal protection of the laws where all railroads are treated alike (as they are in West Virginia under the statute); that they are not deprived of property without due process of law, because the statute itself provides for and requires due process of law.

In *Atlantic Coast Line vs. N. C. Corporation Commission*, 206 U. S. (51 Law Ed. 933), this court said:

"Whether an order of the North Carolina Corporation Commission regulating the train service of connecting carriers was arbitrary and unreasonable, as being beyond the scope of authority delegated to the Commission under state laws, is a local, and not a Federal, question, and cannot be reviewed on writ of error to a state court."

And in *Erie R. R. Co. vs. Board of Public Utility Commissioners*, and other cases, 254 U. S. (65 Law Ed. 322) this court has said:

"A state may, consistently with due process of law, commerce and contract clauses of the Federal constitution, require a railroad corporation engaged in inter-

state commerce to abolish at its own expense, whatever the cost, and without regard to financial ability, highway grade crossings, including those at streets laid out after the railroad was built, if it can reasonably be said that the public safety requires the change."

In other cases the court has held, as we have seen, that public convenience is likewise a matter within control of the state and that requiring facilities necessary for public convenience does not violate the due process of law, commerce and contract clauses of the Federal constitution.

In *C. B. & Q. vs. R. R. Commission*, 237 U. S. 226 (59 Law Ed. 930) Mr. Justice McKenna, delivering the opinion of this court, said:

"It is competent for a state to require adequate local facilities even to the stoppage of interstate trains or the re-arrangement of their schedules."

If interstate trains may be stopped by authority of the state in the exercise of its police power to afford adequate local facilities, certainly it can hardly be argued that a crossing necessary for transferring heavy and bulky freight from the place where it is unloaded by the carrier across the carrier's tracks can be denied.

The railroad company has its day in court and is fully heard. Formal complaint is made, petition is filed, an answer is filed by the railroad company.

a full hearing is given before the Commission, proof is introduced by both sides, argument is made by counsel, and after all this the order is entered.

Even then the right of appeal is given by the statute to the highest court of the state from the order of the Commission. Upon appeal the railroad company is again heard, just as is the other side to the controversy. Nowhere is there any absence of due process. Nowhere is there denial of equal protection of the law, nor is there anywhere any curtailment of the rights of the railroad company.

Counsel for the railroad company here emphasizes the fact that the order of the Commission requires not only that the crossing be constructed by the railroad company but that on the north side of the track the complainant, Followay, shall erect and keep locked, a gate, at the entrance of this crossing, except when Followay or other shippers of the railroad company want to use the crossing for vehicles to pass over the tracks. Such gate was not sought by the complainant, Followay. He asked for a crossing. The Commission doubtless ordered the entrance to the crossing on the north side to be kept closed by this method, because of the repeated assertion of the railroad company that the crossing was dangerous and therefore doubtless by this method intended to limit the use of the crossing to those only who had freight to haul across the railroad tracks. Complaint is also made because the order requires that Followay shall employ and keep a watchman for lookout when using the crossing to lessen the hazard



incident to its use. This is called the making of a contract between the railway company and Followay. We cannot so see it. All it amounts to is the furnishing of additional precautions to lessen any danger incident to the use of the crossing. If the crossing is kept closed by a gate except when being used for transporting merchandise shipped by freight, this necessarily limits the number of people using the crossing and to that extent lessens the danger of any accident at the crossing. To require Followay to keep the crossing closed in no sense makes a contract between him and the railroad company. To require that Followay keep a watchman on the lookout for approaching trains when using the crossing does not effect a contract between Followay and the railroad company nor between him and anyone else. It simply provides this further precaution against accident while the crossing is being used.

It is argued that to place this gate at one end of the crossing and keep it locked closes in the railroad company and closes out the public from the property of the railroad. If the railroad company finds this objectionable they can remedy this situation by removing the timbers which they have placed in the ground at the edge of their right of way for a distance of fifty feet. Let the timbers be taken up. Then the railroad company can get off its right of way and the public can get onto the crossing, whether there be a gate at one end of the crossing or not.

The authority which Followay will have over the gate in no wise prevents the railroad company



from itself using the crossing, from having access to or from its line of tracks and its right of way, nor from according this access to the public in general. As it now is, the crossing is inaccessible. Its use is impossible because of the timbers planted in the ground by the railroad company. The order of the Commission requires the crossing to be opened. To lessen the danger which the railroad company contends accompanies the use of the crossing, the commission requires that one end of it be closed and kept closed by a locked gate except when actually in use by shippers. This is done for the benefit of the railroad company and is done because of the complaint of the railroad company. No accidents have ever occurred at the crossing before but it is contended there is danger of such accidents.

If it is wanted that the crossing shall be opened generally, then let the timbers which the railroad company placed in the ground be taken out of the ground and the crossing will be open generally. These timbers went in because ordered in by the railroad company. They were not placed there by Followay. They were not placed there by the West Virginia Commission nor the Supreme Court of West Virginia, nor pursuant to any order of the Commission or the Court nor by any authority of the Commission or the Court. They are there because of the arbitrary action of the railroad company.

So as to the watchman which Followay is required to employ when using the crossing. If the railway company wants also to have a watchman, that is its privilege. The watchman will have no

control of trains of the railroad company. His sole duty will be to warn those using the crossing of approaching trains. The employment of such watchman does not prevent the railroad company from likewise employing a watchman, nor does it prevent the railroad company from sounding a whistle or bell when approaching the crossing as warning to those who may be using it of the approach of a train. Much is said about the gate and its being locked and about a watchman and his being employed, which has no merit.

The question with which we are here concerned is this: Is the order of the Commission, affirmed by the West Virginia court, requiring the railroad company to construct and keep open this crossing violative of any provision of the Federal constitution? If not, then this court will not interfere with that order. We contend that it violates no provision of the Federal constitution. We maintain that it is a reasonable, fair, even necessary order for a facility for shippers of the railroad company; that it does not deny the railroad company the equal protection of the law; that it was not entered without due process of law, and that it does not in any sense deprive the railroad company of its property.

We conclude this argument by saying that in our opinion the order of the Commission is valid and

proper; that the decision of the West Virginia Court is lawful, does not deny the railroad company of any of its lawful or constitutional rights and should be affirmed by this court.

Respectfully submitted,  
RANDOLPH BIAS,  
LAFE CHAFIN,  
Counsel for John Followay,  
Defendant in Error.

December 20, 1923.

No. 187.

OCTOBER TERM, 1922. Court, U

FILED

DEC 27 1923

WM. R. STANSB

OLE

IN THE  
Supreme Court of the United States

---

NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error,

VS.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,  
et al., Defendants in Error.

---

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA.

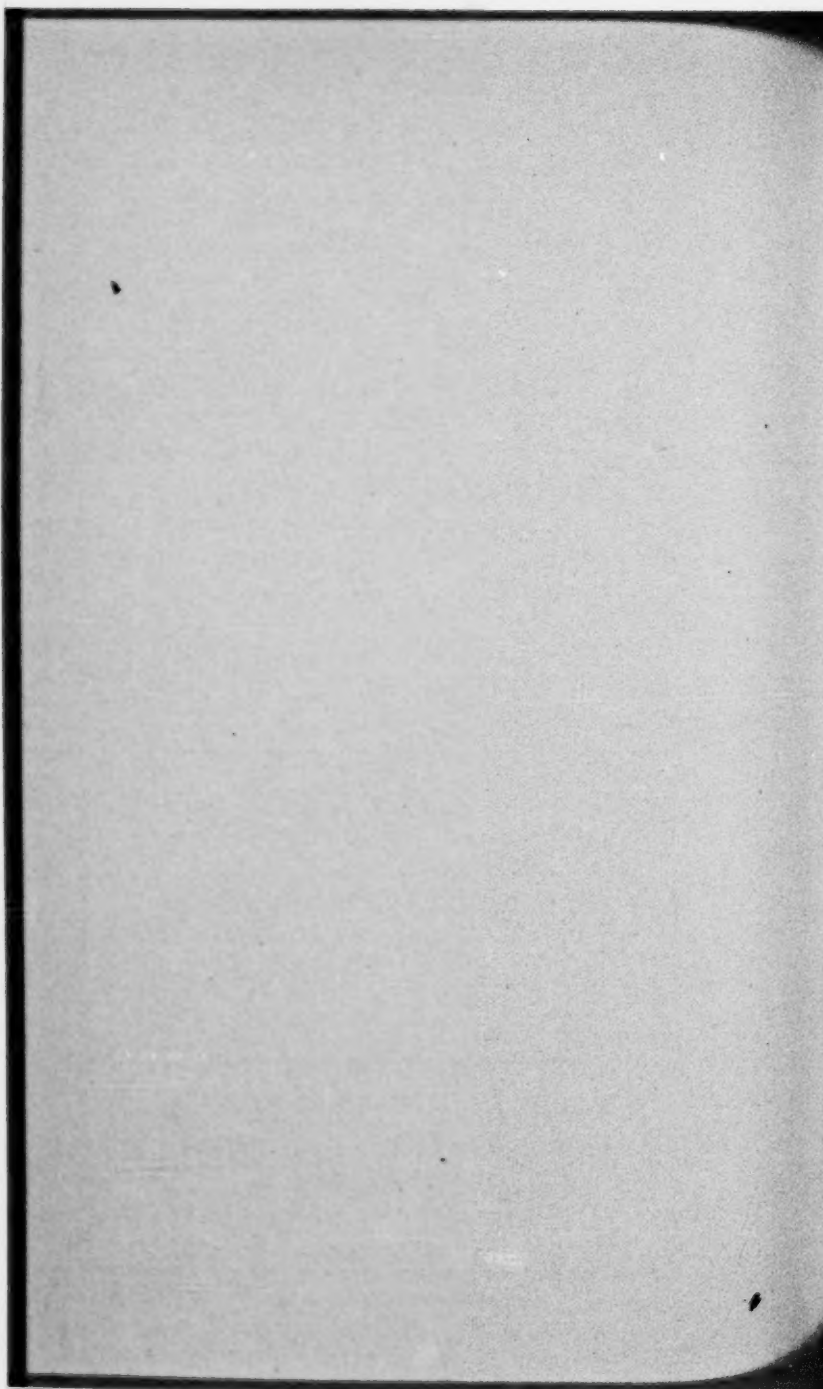
---

Supplemental Memorandum Brief for  
NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error.

---

LUCIAN H. COCKE, JR.,  
LUCIAN H. COCKE,  
THEODORE W. REATH,  
JOHN H. HOLT,

*Counsel for Norfolk and Western  
Railway Company.*



In the Supreme Court of the  
United States.

---

OCTOBER TERM, 1923. No. 187.

---

*Norfolk and Western Railway Company,*  
*Plaintiff in Error,*

VS.

*Public Service Commission of West Virginia,*  
*et al., Defendants in Error.*

---

IN ERROR TO THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA.

---

**SUPPLEMENTAL MEMORANDUM BRIEF  
FOR NORFOLK AND WESTERN RAIL-  
WAY COMPANY, PLAINTIFF IN ERROR.**

In connection with the objection stressed in our  
opening brief to the order of the Commission for

that it turns over to Followay, a stranger, the Railway Company's property in respect of his access and that of other persons and thus deprives the Railway Company of the use and control of its property, we desire to refer to the decision of this Court, not cited in our opening brief, but since brought to the attention of our opponent, Mr. Bias, in *Missouri Pacific Railway Company vs. Nebraska*, 164 U. S. 403. In that case an order of the Nebraska State Board of Transportation required the railroad company to surrender a part of its land to private persons, "John W. Hollenbeck and others, apparently not a corporation, but a voluntary association of persons owning farms and leaseholds in the neighborhood," for the purpose of building and maintaining a grain elevator for storing grain for shipment over the Missouri Pacific Railway. The Supreme Court of Nebraska reviewed and affirmed the order of the Board of Transportation and awarded a writ of mandamus to compel the Railway Company to comply therewith. On error to this Court the judgment was reversed on the ground that the taking of the private property of the corporation for the private use of another was not due process of law. After observing that other persons had been permitted to erect grain elevators upon the Railway Company's property, this Court ex-

plained that "how far the railroad company can be compelled to do" this "is a wholly different question" and stated the point of reversal thus (page 417):—

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public."

The Missouri Pacific Railway had a main line, side tracks and station grounds at the station in question and there held itself out as a carrier of wheat. This gave consignors of wheat the right to enter upon the property of the Railway Company for the purpose of delivering grain and making shipment thereof. But grain elevators were necessary for the purpose of making



such shipments and the Board of Transportation in that case had found "that an elevator is necessary for the shipment of grain by railroad." So doubtless the Missouri Pacific might have been compelled to build an elevator as a stationary facility, but the court held that it could not be compelled to permit other people to build an elevator upon its property and to control the elevator and property wholly or partly to the exclusion of the Railway. So the crossing that Followay got in the order of the Public Service Commission in the case at bar sprang out of a supposed duty to him as a consignee of goods just as the order that the Farmers' Alliance got from the Board of Transportation of Nebraska sprang out of the duty of the Missouri Pacific to the members of that Alliance as consignors of wheat over its lines. In both cases—and here is the exact parallelism of principle—the order took the property of the Railway Company out of the hands and from under the control of the Railway Company without its consent and for a private purpose.

Also another striking similarity between the two cases is worthy of mention. The order of the Public Service Commission in the case at bar may be characterized as not primarily intended to take the property out of the Railway Company's hands but merely intended to have Fol-

loway aid the Railway Company in the performance of its duties by gates, watchmen, etc. Just so in the Nebraska case, it might be said that the object of the Board of Transportation was not to deprive the Missouri Pacific of the control of its property but merely to aid that Company in the performance of its duties by permitting private persons to provide elevators that were necessary for the shipment of wheat over its lines. The controlling principle of constitutional law is that the taking is unconstitutional irrespective of the intent.

Respectfully submitted,

LUCIAN H. COCKE, JR.,  
LUCIAN H. COCKE,  
THEODORE W. REATH,  
JOHN H. HOLT,

*Counsel for Norfolk and Western  
Railway Company.*

DECEMBER, 1923.

# INDEX.

	PAGE OF BRIEF
I. STATEMENT OF THE CASE.....	1
II. SPECIFICATIONS OF ERROR.....	5
1st Assignment of Error.....	5
2d Assignment of Error (abandoned)....	7
III. ARGUMENT.....	7
The order of the Commission as affirmed by the State Court deprives the Rail- way Company of its property without due process and denies equal protec- tion of law, in violation of the Four- teenth Amendment. (See First Assign- ment of Error, Transcript, page 5)...	7

## INDEX OF CASES CITED.

CASE:	Report	Page	Page of Brief
Allgeyer <i>vs.</i> Louisiana.....	165 U. S.	578	15
Coppage <i>vs.</i> Kansas.....	236 U. S.	1	16
C. M. & St. P. Ry. Co. <i>vs.</i> Wisconsin.....	238 U. S.	491	18
Lake Shore & M. S. R. R. <i>vs.</i> Smith.....	173 U. S.	684	11
N. & W. Ry. Co. <i>vs.</i> Public Service Commission, <i>et al.</i> }	91 W. Va.	414 416 423	10 20
	113 S. E.	247	1
Ohio Valley Water Co. <i>vs.</i> Ben Avon Borough....	253 U. S.	287	21
P. R. R. <i>vs.</i> Towers.....	245 U. S.	6	12
Railroad Commission <i>vs.</i> M. & O. R. R. Co.....	244 U. S.	388	14
Washington <i>ex rel.</i> Oregon R. R. & N. Co. <i>vs.</i> R. R. Commissioner.....	224 U. S.	510	17
Barnes' Code W. Va., 1923. Sec. 4, Chap. 15-o.....			8



In the Supreme Court of the United  
States.

---

No. 187.

---

OCTOBER TERM, 1923.

---

*Norfolk and Western Railway Company,*  
*Plaintiff in Error,*

VS.

*Public Service Commission of West Virginia,*  
*et al., Defendants in Error.*

---

In Error to the Supreme Court of Appeals of the  
State of West Virginia.

---

BRIEF FOR NORFOLK AND WESTERN  
RAILWAY COMPANY, PLAINTIFF IN  
ERROR.

---

I

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of Appeals of West Virginia from a judgment which became final September 12, 1922, and is reported 91 W. Va. 414 (113 S. E. Rep. 247), af-

firming an order dated March 11, 1922, of the Public Service Commission of West Virginia that the Railway Company: "do, within thirty days from the date hereof, construct, and thereafter maintain, a reasonably safe and suitable roadway across its tracks at or near the point where said crossing was formerly used by the complainant, as aforesaid; to be not less than eight feet wide, and to be so constructed and maintained as to render the same reasonably safe for the use of vehicles crossing said tracks; subject to the following terms and conditions: (a) The use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) the entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) while said crossing is being used by the complainant, as aforesaid, for the transportation of goods across said track, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing for the purposes aforesaid." The

station crossing so ordered is located at a place called McCarr Siding on the West Virginia side of the Tug River, which is the dividing line at this point between the states of Kentucky and West Virginia. There is not now, and never has been, either a station-house, freight shed, or station agent located at this point (Record, 34). It is distant one mile from the town of Matewan where the public is, and has been since the construction of the railway, amply served with all these facilities (Record, 36). No public highway reaches this siding either from the Kentucky or the West Virginia side of the river, and the crossing would connect with none (Record, 17 and 54). Originally a man named McCoy owned the land upon both sides of the railway and the river, and was allowed a farm crossing at this point (Record, 35). Later he sold his lands north of the railroad to the Blackberry Company, which laid out and platted a village site (Record, 35) on the top of the bluff, at the foot of which, and between it and the river, the railroad runs. None of the streets of the proposed village reach, or were intended to reach, the railway siding (plaintiff's blue print, Record, 30). Still later, and about the year 1905, the Pike Collieries Company opened a coal mine on the Kentucky side and built a private

bridge across the river connecting the two states. It was a double decker. The upper deck contained a track over which the mine cars of the Company were passed, which were unloaded through a tipple constructed on the West Virginia side into Norfolk and Western Railway cars standing upon a switch built by the Railway Company for that purpose. This was the McCarr Siding. The lower deck of the bridge was a wagon-way, for the private purposes of the Coal Company, and its use by other people was at times permitted, but the bridge connected with a public highway at neither end (Record, 17). Still later, and about the year 1913, Followay built a store-house on top of the bluff on the north side of the railroad and opposite the coal tipple and switch (Map, Record, 72). Thereafter, and for his accommodation, prepaid carload shipments, consigned to Followay, were placed upon this switch for him, and less than carload shipments were unloaded for him and others opposite the tracks, and upon the ground, at the risk of the consignee. Less than carload lots consigned to Followay, coming from the East, would be dumped upon the ground on the side of the tracks next to his store, but if such shipments came from the West they would be unloaded along the tracks on the opposite side from his store, and would be either carried by him across the tracks and up the bluff



to his store, or would be hauled across in wagons by him where the old McCoy farm crossing had been. This continued for a period of about eight or nine years, and then the Railway Company, because of a sharp curve and a side-hill cut of the bluff at this point, which prevented railway operatives from seeing an obstruction upon the tracks at this point, either from the East or the West, for a sufficient distance within which to stop trains, planted posts, about five feet apart, along the north side of its tracks, so that wagons could no longer cross the tracks at this point, whereupon Followay instituted the present suit culminating in the order herein complained of.

The Railway Company, appellant in the Supreme Court of Appeals of West Virginia and here, made the Federal objection to this order that the order is not due process and equal protection required by the Fourteenth Amendment. Details of the evidence will be presented in connection with the argument in so far as may be necessary to adjudicate the Federal question. The case is here on writ of error allowed by this Court.

## II

### SPECIFICATIONS OF ERROR.

*First.*—The judgment of the Supreme Court of Appeals of West Virginia entered on May

30, 1922, (rehearing denied September 12, 1922) affirming an order of the Public Service Commission of West Virginia, made the 11th day of March, 1922, commanding Norfolk and Western Railway Company to construct and maintain a roadway across its tracks at McCarr Siding, in the County of Mingo, and State of West Virginia, "subject to the following terms and conditions: (a) the use of said crossing shall be limited to the transportation of goods and merchandise consigned to the complainant and other shippers, and carried by the defendant, as aforesaid; (b) the entrance to said crossing on the north side of said tracks of the defendant railway company shall be closed by a gate, to be constructed and maintained by the complainant, and by him kept closed and locked, except when said crossing is being used for the purposes aforesaid; and (c) while said crossing is being used by the complainant, as aforesaid, for the transportation of goods across said tracks, by the use of vehicles, the complainant shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing for the purposes aforesaid," deprives your petitioner, the Norfolk and Western Railway Company, of its property, without due process of law, and likewise denies your petitioner the equal protection

of the laws, all in violation of Section 1 of Article 14 of the Amendments to the Federal Constitution; and

*Second.*—

(The second assignment is abandoned.)

### III

#### ARGUMENT.

The order of the Commission as affirmed by the State Court deprives the Railway Company of its property without due process and denies equal protection of law in violation of the Fourteenth Amendment.

(See *First Assignment of Error, Transcript, page 5.*)

By the order of the Commission as quoted in the first specification of error the Railway Company was required to construct and maintain a roadway for a station crossing of its tracks at McCarr Siding, Mingo County, West Virginia.

The complainant at whose instance this order was entered was John Followay, a store-keeper in the neighborhood of McCarr Siding.

The effect of this order was to require the carrier to establish and maintain a carrier delivery facility which by the terms of the order could be utilized only with the immediate and

continuous operative participation of John Followay and under his direction and control. This order was based by the Commission upon Barnes' Code of West Virginia, 1923, Section 4, chapter 15-o, which is in part as follows:—

“Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just.”

This direction and control by Followay extends to the time and circumstances attending such use and operates to withdraw the same from the direction and control of the carrier just as completely as if the gates at a grade crossing were to be lowered or raised at and only at the discretion of some one beyond carrier control.

Superintendent Franklin testified (Transcript, page 60) that he would consider the proposed station crossing “a very dangerous crossing”: that the limit of visibility of the crossing from an engine approaching from the east is 231 feet: and from the west 293 feet: “but the engineer on an eastward bound train could not see this crossing until he was practically on same.”

The proposed station crossing as shown by the map or sketch and photographs, exhibits 1, 2, 3, and 4, Franklin (following Transcript, page 72),

is on a curve, crosses three tracks, two main and a middle siding, around a bluff or side hill cut on a river bank. Superintendent Franklin testified (Transcript, pages 61-2):—

“Q. Now, Mr. Franklin, take for granted there is a crossing at the point indicated on the map from which you have testified, would it be possible for a train to be stopped before it reached the crossing at a point at which the engineman might see an individual or wagon or any obstruction on the crossing?

“A. It would not be possible, providing the train was making a speed of 10 to 12 miles an hour or better. Of course the character of the train would enter into that feature largely, as a light engine or a light train could reduce speed or stop much more quickly than a train of greater weight.

“Q. But, take an average movement on this line, would you consider that a safe distance within which to apply the brakes to secure a stop before passing over the crossing?

“A. I would not.”

The witnesses produced for the complainant described other grade crossings of highways or whatnot over the Norfolk and Western Railway at other points, and urged that this station crossing for Followay and patrons in the neighborhood would be no more dangerous than the other de-

scribed crossings. There was no suggestion that the Followay station crossing would not be dangerous. If such a facility may always be accorded upon proof that on the same system of railroad there are other similar conditions equally dangerous, this will tend to block the effort, by grade separation, toward safety of trains and of those using crossings.

So there was no dispute that the crossing would be dangerous and the Commission, recognizing this, attempted to guard against this danger by adding the "terms and conditions" lettered (a) to (c) as quoted in our statement of the case.

The Supreme Court of Appeals of West Virginia determined this Constitutional problem by considering the crossing as established for the single purpose of access by shippers to receive freight, and in this connection the Court stressed the circumstance "that his '(complainant's)' merchandise is, and for ten years or more, has been, shipped and delivered to him at McCarr siding, in carload and less than carload lots, mostly on the south side of the railway, opposite plaintiff's store located on the north side of the railway"; 91 W. Va. 416. Followay's testimony (Transcript, page 33) was in general as follows: That he had to cross the tracks between his store and the point where the freight from the west was put on the ground; that this freight

from the west was unloaded by the Railway Company at "two points", "one is a kind of station, the ground filled up and made smooth between the main line and siding and the Alma Thacker switch": that he had to cross sometimes three and sometimes four tracks to get to the store in receiving freight from the west; that on the average he had to move the freight from the place of unloading one hundred feet until he could get free of the tracks; that "during the ten years" in which he had had a store there he had "been hauling it in wagons and carrying it; carry it across the tracks and reload it," etc., (page 34); that "the heavy stuff" had to be carried over by wagon or by hand: that the freight was unloaded on the ground: that there was no station or freight house: that at one time there had been a private or farm crossing at this point: that a month before the trial the section foreman had erected posts four or five feet high to prevent wagons from crossing the track at Followay's store: that Followay's vehicles had crossed the track at this point for ten years.

The decision of this Court in *Lake Shore & Michigan Southern Railway vs. Smith*, 173 U. S. 684, lays down the rule that the sale of mileage books for ten years does not give legislative

authority to require such sale. In that case this Court pointed out that "what the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature." This general proposition has never been qualified by the Court, so far as we know. This Court did say in *Pennsylvania Railroad vs. Towers*, 245 U. S. 6, that the views expressed in the *Smith* case "inconsistent with the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled." This qualification as to commutation rates sets no other limitation. But it is not necessary to decide the case upon this principle because the order adds to the former practice important qualifications of and limitations upon the use and control of this Company's property.

In the case at bar we have the re-establishment in permanent form of the permissive practice of the past, with the addition of an important enlargement of the taking and user of the Railway Company's property for the benefit of Followay and through him for other patrons. The ten-years practice is unrelated to these important enlargements of the user and incidental necessary encroachments upon and limitations of the prop-



erty rights of the Railway Company. Followay is to construct and maintain a gate on the north side of the Railway Company's tracks and keep this gate closed and locked except when the crossing is being used: and while the crossing is being used by Followay he "shall employ a watchman for lookout for the purpose of giving notice of approaching trains, so as to lessen the hazard incident to the use of said crossing."

*Literatim* the order does not afford any protection to the Railway Company during the "use of vehicles" by other patrons than Followay because (c) is in terms limited to times when "said crossing is being used by the complainant." Perhaps the Commission intended this provision to require Followay to furnish a watchman during the use of the facilities by vehicles of other patrons. In any event, there is either Followay's protection or there is none during the use of the facilities by other patrons than Followay. The guarding of this station crossing is not only removed from control of the Railway Company but is also divorced from all co-ordination with railway operation.

The truth is that the Commission, recognizing the hazard, has required the parties, the Railway Company on the one hand and Followay on the other, to enter into a relationship like a contract. In this new relationship created by the order the

status is as if the Railway Company covenanted to open and maintain the station crossing and Followay covenanted to construct and maintain a gate, keep the gate locked except when in his use, or that of other patrons of the Railway Company, and to furnish a watchman while the crossing is being used for the transfer of his goods across the tracks by vehicles, from trains. The order forced upon the Railway Company a relationship like that which would have resulted from a contract to constitute Followay the agent of the Company at McCarr siding. And this is true, although the Public Service Commission has no continuing jurisdiction over Followay, a natural person, and the Railway Company, would not have authority over him to direct his performance of his duties or to discharge him for neglect. Unless guarded by these mutual covenants which the Commission deemed protective, the Commission probably would not have entered any order. So the order from the viewpoint of the Fourteenth Amendment as due process of law must be tested not by the practice of the past but by the entire status including the new obligations which the order creates imposing reciprocal rights and duties upon the parties. The order must be tested constitutionally as a whole: *Railroad Commission vs. M. & O. R. R.*, 244 U. S. 388 at page 396.

Unrelated to Followay's status as a consignee this order vests in him the powers of an agent of the Railway Company without subjecting him to its control. This will appear from such terms of the order as the one which requires Followay to keep the gate "closed and locked, except when said crossing is being used for" the transportation of goods and merchandise across the tracks "consigned to the complainant *and other shippers.*" The order cannot be justified as to these reciprocal obligations and rights between Followay and the Railway Company as a regulation of the business of common carriage conducted by the Railway Company for Followay. The order makes a contract with him which the parties did not make. The police power of the States which is being exercised by the Commission in making this order cannot extend so far. The Railway Company cannot be required to rely upon Followay for the use of these facilities by patrons and the protection of patrons in that use.

Freedom of contract protected by the Fourteenth Amendment has been thus defined in *Allgeyer vs. Louisiana*, 165 U. S. 578, at page 589:—

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the

citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

This freedom to make a contract would be a dry right unless it includes freedom to refuse. The order in the case at bar forces upon the Railway Company a contract status with Follower by which he is constituted the agent of the Railway Company to construct and maintain the gate: keep the gate locked except when he or other patrons desire to use the station crossing facilities: to maintain a watchman if he is using vehicles across the tracks, and the other duties which he is to undertake by the reciprocal features of this order; duties which make him a *quasi* employee and are unrelated to contracts of carriage between him and the Railway Company.

In *Coppage vs. Kansas*, 236 U. S. 1, this Court declared that the State could not, consistently with the Fourteenth Amendment, introduce into contracts of employment a condition that the em-

ployee will not become or remain a member of a labor union. After pointing out that "an interference with the normal exercise of personal liberty and property rights" to make contracts of employment was "the primary object of the statute, and not an incident to the advancement of the general welfare," this Court said (page 19):—

"The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment."

The principle which has seemed applicable is expressed in *Washington ex rel Oregon Railroad & Navigation Company vs. Railroad Commissioners*, 224 U. S. 510. There a State Railroad Commission ordered two trunk line railroads to construct and operate a track connection for the interchange of business—an order which in effect made a contract between the parties to construct and operate this interchange facility. The two railroads litigated the order as not due process of law, the evidence being insufficient to show that the existing service was inadequate or that freight would be offered in the future to move by the proposed track connection. On error to this Court the judgment in the Supreme Court

of the State of Washington was reversed and the order of the Commission there under review was found not to be due process of law. So with a facility concededly for use in interstate commerce—an interchange connecting track.

In *C. M. & St. P. R. R. Co. vs. Wisconsin*, 238 U. S. 491, this Court declared a Wisconsin Statute void as in conflict with the Fourteenth Amendment. The Statute imposed a penalty on sleeping car companies if, the lower berth being occupied, the upper berth was let down before it was actually engaged. This Court pointed out that the Statute could not be justified as a relief measure and constituted a taking of the Company's property without compensation for the benefit of the purchaser of the lower berth unrelated to required accommodation. So with Followay's agency unrelated to any carrier business between him and the Railway Company.

Here not only has the Commission undertaken to compel the Railway Company to enter into such a contract but has designated by name the person with whom the contract shall be made; has designated Followay individually aside from his status as shipper and the life and efficacy of the order is and must remain dependent upon the presence, inclination, capacity and life of Followay.

If the Railway Company adopt its own separate precautions for the protection of trains during the use of those crossing, not relying upon Followay's gate and his watchman, what then? "The entrance \* \* \* on the north side of said tracks \* \* \* shall be closed by a gate" which Followay is to construct, maintain and keep locked except when in his use or that of other patrons. The order gives Followay exclusive authority over the gate. The Railway Company would not under the order be entitled to notice of intended use of the gate so as to add appropriate train protection at any given time of use by Followay or other patrons under his permission. And if the Railway Company were to construct a gate of its own nearer the track than Followay's gate, then Followay and other patrons would not have the access which the order was entered to give them. The order imposes the duty upon him to construct, maintain and keep the gate locked in order to give this access. So there seems to be no way consistent with the order for the Railway Company to protect its trains and patrons using the facility. He is given control of access and use of the Railway Company's property. The Constitution, as Webster observed, was made to guard the people against the dangers of such "good intention, real or pretended," as this order displays. The fact is that Followay's store is at

the edge of the right of way (Followay's testimony, Transcript, page 31; Franklin's testimony, Transcript, page 66). Necessarily the gate would have to be either on the party line or wholly on the Railway Company's property in order to operate as the order contemplates for control of the user of the station crossing by patrons of the Railway Company.

In conclusion we may notice the considerations upon which the Supreme Court of Appeals of West Virginia decided that the Commission's order constituted that due process and equal protection of the law which are required by the Fourteenth Amendment. Speaking to that point the Court said (91 W. Va., 423):—

“Does the order deprive the railway company of its property without due process, or of the equal protection of the law? Certainly it does not if the service required by the order is reasonably within the absolute duties of the carrier, or unless it amounts to an arbitrary or unreasonable exercise of the powers of the Commission. In *United Fuel Gas Co. vs. Public Service Commission*, 73 W. Va. 571, we decided that the process of the Public Service Commission, with right to be heard before it and to have its orders reviewed here as to all matters involved, satisfied all the requirements of due process and other constitutional



rights; and also that the orders of the Commission were to be regarded as final unless beyond the power which the Commission could constitutionally exercise, or beyond its statutory power, or based upon a mistake of law."

The decision does not here either discuss or review the order and its terms.

The assertion is that the "right to be heard before" the Commission "and the right to have its orders reviewed" in the Supreme Court of Appeals of West Virginia "as to all matters involved, satisfied all the requirements of due process and other constitutional rights," unless the order is "beyond" the "statutory power" which the Commission could constitutionally exercise. This is a circle. The constitutional exercise of the Commission's power is the very question in the case at bar, and the Supreme Court of Appeals of West Virginia does not reach this question.

This Court recently in *Ohio Valley Water Company vs. Ben Avon Borough*, 253 U. S. 287, considered an order made by the Public Service Commission of Pennsylvania fixing the value of a water company's plant and the revision of this order by the Superior Court of Pennsylvania (an intermediate tribunal) raising the value found by the Commission of \$924,744.00 to \$1,-324,621.80 and authorizing rates sufficient to yield

7 per cent. upon this value as raised. The decision of the Superior Court had been reviewed by the Supreme Court of Pennsylvania, and that Court, after stating that the appeal "involved the question of the fair value, for rate making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect," and after noting that the Superior Court had differed from the Commission as to the proper valuation of the property, then ruled that:—

"A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

In reversing the Supreme Court of Pennsylvania for failing to accord a hearing such as the Fourteenth Amendment requires, this Court said at page 289:—

"Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of

the Commission comes to be considered on appeal. \* \* \*

"In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. \* \* \*

"Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the Commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the State to provide."

So this Court decided that a constitutional hearing was not accorded by a shutting of the mind to the problem in this way.

Similarly a constitutional hearing was denied in the case at bar as evidenced by the opinion of the Supreme Court of Appeals of West Virginia which establishes authority in the West Vir-

ginia Commission unrestrained by the Court hearing.

The Commission's order considered as a whole in the light of the uncontroverted material facts constitutes an arbitrary taking of and limitation upon the property and rights of the Railway Company and denies due process and equal protection of the law.

Respectfully submitted,

LUCIAN H. COCKE, JR.,  
LUCIAN H. COCKE,  
THEODORE W. REATH,  
JOHN H. HOLT,

*Counsel for Norfolk & Western  
Railway Company.*

OCTOBER, 1923.